

EXHIBIT “B”

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

KENNETH E. SALAMONE AND RUFSTR RACING, LLC, *

Plaintiffs, *

-v- 19-cv-1213 *

DOUGLAS MARINE CORPORATION, *

Defendant. *

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE MAE A. D'AGOSTINO
April 22, 2021
445 Broadway, Albany, New York

FOR THE PLAINTIFFS:

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FOR THE DEFENDANT:

HARRIS, BEACH LAW FIRM
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1 (Held out of presence of jury)

2 THE COURT: Record should reflect that we are
3 in open court, outside the presence of the jury, for a
4 charge conference and to deal with issues of law.

5 First of all, last night I took the
6 opportunity to review further the evidence adduced at
7 trial.

8 On April 21st, the Court reserved on
9 defendant's motion for directed verdict regarding
10 plaintiffs' conversion and fraud claims. The Court will
11 now grant defendant's motion as to these claims.

12 Defendant's motion regarding plaintiffs'
13 claims for fraud may be granted as there is no legally
14 sufficient evidentiary basis for a reasonable jury to
15 find in favor of the plaintiffs.

16 Plaintiffs have failed to put forth facts
17 demonstrating that defendant knowingly made a false
18 statement of material fact with the intent that
19 plaintiffs rely on their misrepresentation and that
20 plaintiffs did so reasonably.

21 Plaintiffs testified that defendant made
22 fraudulent misrepresentations in letters on June 27th,
23 2017, and July 5th, 2017, and in text messages
24 throughout 2017, 2018 and 2019.

25 Plaintiffs claim that this induced them to

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1 make payments on a Skater and purchase the Mercury
2 engines and drives. However, plaintiff made these
3 payments on December 31, 2015, December 30th, 2016, and
4 March 2nd, 2017, as demonstrated in Joint Exhibits 6, 14
5 and 20. All of the alleged fraudulent letters occurred
6 after these payments; Joint Exhibits 25 and 29.

7 Finally, the alleged 2017 text messages prior
8 to March 2nd, 2017, were mainly requests from the
9 plaintiff for photos of the Skater and photos sent in
10 response to those requests; Joint Exhibit 43.

11 The only other conceivable progress report in
12 these text messages was on January 31st, 2017, when
13 Plaintiff Salamone asked whether the Skater was painted,
14 and Mr. Cutsuries said, quote, not yet. Not only have
15 the plaintiffs failed to prove that Mr. Cutsuries'
16 assertion that the Skater was not yet painted was false,
17 but that they reasonably relied on this assertion to
18 make the March 2nd, 2017, payment.

19 Additionally, plaintiffs asserted in their
20 complaint that defendant made false representations
21 regarding sale of the Skater to Mr. Sheker; docket
22 number at 98.

23 However, plaintiffs failed to present any
24 evidence demonstrating that defendant knowingly made
25 these false statements of material fact with the intent

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1 that plaintiffs rely on their misrepresentation and
2 plaintiffs did so reasonably. In fact, plaintiffs
3 offered no evidence that they relied on these statements
4 regarding the sale of the boat. The only arguable
5 reliance was that plaintiff flew to Michigan based on
6 these statements to discuss the sale of the boat.

7 However, there is no evidence that plaintiff's
8 flying to Michigan to discuss the sale of the Skater was
9 reasonable. There were many other ways that plaintiff
10 could have discussed sale of the Skater by text, which
11 he had done often by phone, just to mention a couple.

12 A jury cannot find that plaintiff's trip to
13 Michigan was reasonable, as I said, as all previous
14 communications were via text, phone and email.

15 Mr. Hledin testified that plaintiff had never
16 traveled to Michigan before his trip in May 2018, not
17 even to tour the facility or examine the Skater or its
18 progress. However, upon no new information being
19 provided to him as to the sale of the Skater, the
20 plaintiff flew to Michigan to communicate with
21 defendant. Thus, plaintiffs have not provided any
22 evidence that Mr. Salamone reasonably relied on
23 defendant's assertions that the boat had not sold when
24 he traveled to Michigan.

25 Therefore, there is no legally sufficient

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1 evidentiary basis for a reasonable jury to find in favor
2 of the plaintiffs on their fraud claim, and defendant's
3 motion for a directed verdict is granted.

4 Similarly, plaintiffs' conversion claim must
5 be dismissed because they are duplicative and seek
6 double recovery of their breach of contract claims; see
7 Toyz versus Wireless Toyz, Incorporated, 799 F.Supp 2d
8 737, 746, Eastern District of Michigan 2011.

9 While the plaintiffs assert that the Mercury
10 engines, transoms and drives were purchased through a
11 separate agreement, subsequent invoices and documents
12 demonstrate that the final contract was inclusive of
13 these items.

14 Further evidence of this is that plaintiffs
15 seek recovery of the payment of the Mercury engines,
16 drives and transoms through their breach of contract
17 claim. The fact that the purchase of these items was
18 incorporated into the final contract is further
19 supported by the fact that the agreement provided that
20 the defendant was required to place the Mercury engines,
21 drives and transoms into the Skater before delivery or
22 tender to plaintiffs.

23 Finally, dismissal of this claim is
24 appropriate because under Michigan law, an action in
25 tort requires a breach of duties separate and distinct

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1 from a breach of contract, which has not been alleged or
2 established in this matter; Brock versus Consolidated
3 Biomedical Labs, 817 F.2d 24, 25, Sixth Circuit 1987.
4 Also Massa versus Eaton Corporation, 1989 Westlaw 101914
5 at 3, Western District of Michigan 1989.

6 Accordingly, the Court grants defendant's
7 motion as to plaintiffs' conversion claim.

8 Finally, the Court denied plaintiffs' motion
9 to dismiss all defendant's affirmative defenses. To the
10 extent that defendants have not proven these defenses at
11 trial or given proposed jury instructions encompassing
12 these defenses, they are being waived at this time.

13 I want to ask counsel some questions about
14 numbers in this case. Before I do that, let me say that
15 when I realized that there were 99 stipulations as to
16 fact, I decided not to read them during my final
17 instruction to the jury. Rather, we have redacted
18 Defendant's Exhibit D5 and are sending in only the
19 stipulated facts, and you can take a look at that, and
20 you will take a look at it before it goes in to the
21 jury. I will remind the jury that there were factual
22 stipulations and that they will have them in the
23 courtroom.

24 Are we at least able to tell this jury or am I
25 able to tell this jury an agreed-upon contract price for

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1 this Skater?

2 MS. HOFFMAN: Good morning, your Honor. Yes,
3 I think we would agree on the contract price and the
4 payments that --

5 THE COURT: And what is that, according to
6 both sides?

7 MS. HOFFMAN: The -- the contract price?

8 THE COURT: Yes.

9 MS. HOFFMAN: Sorry, Judge.

10 THE COURT: I want to see if both sides agree
11 at this point what the contract price was because I'd
12 just like to spit it out for the jury. I believe I know
13 what it is, but I want to hear it from you.

14 MS. HOFFMAN: I think it's 555 --

15 THE COURT: What I have is 542117 but take a
16 moment, confer, and tell me what the contract price was.

17 MS. HOFFMAN: Just one second, Judge, we will.

18 THE COURT: Take your time.

19 MS. HOFFMAN: So, Judge, Joint Exhibit 5, the
20 contract dated December 31, 2015, it's a contract price
21 at 255,559, and that number has been increased, Judge,
22 because the prior contract had that question mark as to
23 whether the additional hatch would have been included.
24 It was included, and that brings us to the 255559.

25 MR. LITTLE: I think that's -- I think the

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1 total -- I think the total contract price was 555559.
2 There's a \$13,000 addition to the 542 number, your
3 Honor, in Joint Exhibit 5. That brought the total to
4 555, less credit of 300,000 paid.

5 THE COURT: Do you agree that the contract
6 price, defense counsel, is 555,559? We have to give the
7 jury some guidance.

8 MR. LECOURS: Your Honor, that number doesn't
9 include the engines that were added to the contract. So
10 I think you have to add 140,000.

11 THE COURT: Do you agree you have to add
12 140,000?

13 MS. HOFFMAN: We do, Judge.

14 THE COURT: I didn't bring my calculator in.
15 Use your phones and tell me what the full amount is,
16 then.

17 MS. HOFFMAN: I want to go on a limb, 695559.

18 THE COURT: That's what I have, even without
19 my calculator; 695559.

20 MR. HALLAK: There are I think --

21 THE COURT: You have to use the microphone.

22 MR. HALLAK: I think there are a couple of
23 issues that we need to talk about. There's the -- we
24 are talking about add-ons to the contract. I think we
25 also need to talk about the cost of the paint that was

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1 added on afterwards, and I also see from -- just going
2 through the letters that I thought that was always a
3 good starting point after the rejection of the boat, we
4 have --

5 THE COURT: I just want to know what the
6 contract price was.

7 MR. HALLAK: So it would be 723559 plus 38,500
8 for the cost of the paint.

9 THE COURT: As I look at your trial briefs,
10 none of the numbers make any sense to me.

11 MR. HALLAK: Your Honor, that was based off of
12 the invoice that we had submitted to Mr. Salamone on
13 2/27/2017 and also Ms. Hoffman's letter dated June 30th,
14 2017, that is Exhibit 28, which says as you are
15 certainly aware, the balance due on the boat is 222059,
16 but the purchase price of this boat is 723559, but that
17 also did not include the 38,500 for the paint.

18 THE COURT: Is that accurate, Ms. Hoffman, in
19 your view?

20 MS. HOFFMAN: Judge, just give me a quick
21 second, if I can.

22 THE COURT: Yes.

23 MS. HOFFMAN: Do you have that exhibit?

24 (Pause in proceeding.)

25 MS. HOFFMAN: I would agree. I would agree.

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1 We can use the 723559.

2 THE COURT: Plus the 38,000 for paint?

3 MS. HOFFMAN: No, Judge. We assert that
4 number appeared in October, and we disputed that all
5 along that that was included in the contract price. So
6 we do not agree that the 38 five in any way was part of
7 this contract.

8 MR. LECOURS: Your Honor, a suggestion might
9 be that the parties agree that the contract price was
10 723559. The parties -- plaintiffs assert that the paint
11 was not included in the contract; the defendants assert
12 that it was and state the amount.

13 THE COURT: Will that work?

14 MS. HOFFMAN: That works for me.

15 THE COURT: Okay. Plaintiffs assert that the
16 sum of 38,000 was not included in the contract, and
17 defendants assert that it was.

18 MR. HALLAK: I think it's the other way
19 around. I think plaintiff is asserting that the cost of
20 the paint was included in the 723, and we're asserting
21 that the cost of the paint was extra.

22 THE COURT: Okay.

23 MR. LECOURS: That's right. Sorry.

24 THE COURT: Plaintiffs assert that 38,000
25 was included?

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1 MR. HALLAK: No.

2 THE COURT: Was not?

3 MR. HALLAK: The plaintiffs assert that the
4 38,500 was included in the purchase price of the
5 contract. The defendants assert that the cost of paint
6 was not included in the cost of the contract and was an
7 additional charge of \$38,500.

8 MS. HOFFMAN: We don't assert that the 38 five
9 was in the contract. We assert that paint was included.
10 They assert it was an additional charge for paint.

11 THE COURT: Okay. So plaintiff asserts that
12 \$38,000 --

13 MS. HOFFMAN: We assert paint was included.

14 THE COURT: All right. Let me just get this
15 down. Plaintiff asserts that paint price was included?

16 MS. HOFFMAN: The cost of paint was included
17 in the price of the contract and the defendant
18 asserts --

19 MR. HALLAK: The cost of paint was an
20 additional charge in the amount of \$38,500.

21 MS. HOFFMAN: That's it.

22 THE COURT: 38,500. Is that the number?

23 MR. HALLAK: Yes.

24 THE COURT: Okay. So both sides agree that
25 the contract price was \$732,559. At issue is whether --

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1 MR. HALLAK: As a small correction, your
2 Honor. The number is 723,559.

3 THE COURT: Okay. 723559, however,
4 the plaintiff asserts that the cost of paint was
5 included in the contract, and the defendant asserts that
6 the cost of the paint was an additional charge, and the
7 amount in question for that is 38,500.

8 MR. HALLAK: That's correct, your Honor.

9 THE COURT: Okay. So at least I can tell this
10 jury that you stipulated to the contract price 723559,
11 and then I'll go into the cost of the paint.

12 Is there an agreement on what the plaintiff
13 actually paid? Is there a number that I can give to the
14 jury that you all agree is what the plaintiff paid?

15 MR. HALLAK: I think we would agree on all
16 sides that the plaintiff paid a total of 500 --

17 MS. HOFFMAN: 501 five.

18 MR. HALLAK: 501500.

19 MS. HOFFMAN: And we would agree that the
20 plaintiff received \$50,000 back.

21 MR. HALLAK: Correct.

22 THE COURT: Hang on a second. Give me the
23 number that you agree that the plaintiff paid in total.

24 MS. HOFFMAN: I'm sorry, your Honor?

25 THE COURT: Give me the number that you agree

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1 that plaintiff paid in total.

2 MS. HOFFMAN: Plaintiff paid total of 501,500.

3 THE COURT: \$501,500.

4 MS. HOFFMAN: Yes, ma'am.

5 MR. LECOURS: Agreed.

6 THE COURT: Is there anything else you want me
7 to tell the jury you agree on with respect to the
8 statistics? Numbers? Because after they are in there
9 for 30 seconds, they are going to call for a calculator.

10 MS. HOFFMAN: We would agree that
11 the defendants remitted \$50,000 to the plaintiff.

12 THE COURT: Agree?

13 MR. HALLAK: Yes.

14 MR. LECOURS: Agree.

15 THE COURT: Okay. Defendant remitted 50,000.
16 Okay. At least that gives them a little guidance.

17 MS. HOFFMAN: I think we would agree, your
18 Honor, that if the jury found for the plaintiff, the
19 amount of damages is a fixed number of 451,500.

20 THE COURT: That's the 501 minus the --

21 MS. HOFFMAN: It is, your Honor.

22 THE COURT: -- 50? Is that the agreed-upon
23 damages if they find for the plaintiff?

24 MR. LECOURS: Subject to mitigation.

25 THE COURT: Assuming mitigation has been

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1 proven.

2 MR. LECOURS: Yes, assuming that they believe
3 that the defendant proved mitigation by a preponderance
4 of the evidence, as stated, I believe, in the proposed
5 charge, then the 451 five should be reduced by whatever
6 amount of mitigation the jury deems has been proven.

7 THE COURT: You know what? I --

8 MS. HOFFMAN: I thought you dismissed the
9 affirmative defense a few minutes ago.

10 THE COURT: Since -- what mitigation did the
11 defense prove?

12 MR. LECOURS: Failure mitigation. It's the
13 lack of steps that were taken by Mr. Salamone to
14 participate in the sale, and then also that when he was
15 involved --

16 THE COURT: You say that when he participated
17 in the sale, he messed it up. I mean --

18 MR. LECOURS: Initially the sale -- it was --
19 it was his idea to list this boat at a, you know, the
20 top price, initially, and pressured them to do that.
21 That, you know, impeded the efforts to sell the boat,
22 delayed those efforts, and then when he was involved
23 later, he made difficult and rendered impossible the
24 first sale.

25 THE COURT: As I said yesterday, that's very

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1 speculative but I'll take that under advisement.

2 MS. HOFFMAN: There's no number that they ever
3 provided or demonstrated or even attempted to prove.

4 THE COURT: I know. There is no number. It's
5 very speculative. I'll take it under advisement. When
6 you folks gave me your proposed charges, and you gave me
7 the proposed charges on damages, which begin at page 15,
8 what I handed out to you and it continues on page 16 and
9 17, you both said that you agreed with those -- that
10 charge on damages.

11 Do both sides still agree with that charge as
12 was given to me in the pretrial steps as what I should
13 charge the jury? That's taken out of your proposal to
14 me.

15 MR. LECOURS: Yes, your Honor.

16 MR. HALLAK: The only thought that I had on
17 that, I apologize, your Honor, is that one possible
18 addition on 16 in the bolded part.

19 THE COURT: Use your microphone.

20 MR. HALLAK: Sorry. Right -- bottom of page
21 16, Section B-2, breach of contract damages, we have
22 amounts, the amounts paid by plaintiffs that the
23 defendant -- the contract price, and I think the other
24 component that we might want to add back in is the
25 amount paid by the defendant to the plaintiff.

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1 THE COURT: The amount the plaintiff paid to
2 the defendant --

3 MR. HALLAK: Contract price.

4 THE COURT: The contract price. Do you still
5 want the expenses the plaintiff saved as a result of the
6 breach?

7 MS. HOFFMAN: No, Judge. I don't think
8 anybody has any evidence on that issue.

9 MR. LECOURS: I think the -- that we put in
10 evidence of all the costs that we incurred in the sale
11 of the boat, and those were costs that Mr. Salamone
12 would have incurred; storage, charges along the lines --
13 and then all the charges that were incurred selling the
14 boat to Mr. Sheker.

15 THE COURT: When you say the expenses the
16 plaintiffs saved as a result of the breach, you're
17 talking about storage and advertising?

18 MR. HALLAK: And all the additional work that
19 we had to do to make the sale happen, including the
20 additional rigging work --

21 MR. LECOURS: I was just going to say that
22 that's the difference between what would the rigging
23 would have been done, you know, at fair value as opposed
24 to the very discounted rate for the rigging work that
25 they ultimately had to use to resell the boat to

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1 Mr. Sheker.

2 MS. HOFFMAN: Your Honor, if I can address
3 that. That sentence says subtract the expenses the
4 plaintiff saved. The plaintiff didn't save any of those
5 expenses. Those were expenses the defendant entered
6 into a separate contract for --

7 THE COURT: Well --

8 MS. HOFFMAN: -- as a --

9 THE COURT: Go ahead.

10 MS. HOFFMAN: All of those items that they
11 just recited are not consequential damages of the
12 plaintiff. Those are steps that they took in a separate
13 contract with a separate purchaser. They don't relate
14 in any way to the breach of contract damages.

15 MR. LECOURS: Your Honor, just to respond to
16 that briefly. They are not damages for the plaintiff.
17 It's a subtraction from their damages. These are --
18 because these are costs associated with selling the
19 boat, if Mr. Salamone had sold the boat, those are costs
20 he would have incurred.

21 MS. HOFFMAN: But he didn't own the boat and
22 we stipulated to that. So that's a hypothetical that
23 doesn't exist here, Judge, and we are going to ask the
24 jury to pretend that they could understand that if he
25 hypothetically owned the boat, that they have -- that

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1 the parties stipulated we didn't own, that
2 hypothetically, he could have had to have incurred
3 costs.

4 THE COURT: I tend to agree with Ms. Hoffman
5 on that. When I look at B there, from the amount the
6 plaintiff paid to defendant, which we have now
7 stipulated was 501500?

8 MR. HALLAK: Correct.

9 THE COURT: You must subtract the contract
10 price, which is 723059, and that ends up in a negative
11 number. What are we doing?

12 MR. LITTLE: I think two and one need to be
13 flipped. I think you need to subtract the amount that
14 plaintiff paid from -- no, that's not right, either. I
15 apologize.

16 MS. HOFFMAN: Defendant paid to us, your
17 Honor.

18 THE COURT: From the amount --

19 MS. HOFFMAN: That plaintiffs paid to
20 defendant.

21 THE COURT: Yes.

22 MS. HOFFMAN: I think we insert there 501
23 five. Defendant paid plaintiff \$50,000, and then I
24 think we need to strike the balance of that and say the
25 resulting contract damages are \$451,500.

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1 THE COURT: This is why I like people to
2 really think about pretrial submissions because this
3 makes no sense. What is it that you intended to say?

4 MR. LECOURS: I think that the amount the
5 plaintiffs paid should be flipped with the contract
6 price, and in the -- so from the contract price, you
7 must subtract the amount plaintiffs paid to the
8 defendant. No, that doesn't --

9 MR. LITTLE: That leaves --

10 MS. HOFFMAN: That assumes that they didn't
11 sell the boat for 300 additional thousand dollars.

12 THE COURT: From the contract price of
13 723,500, plus or minus 38,000, whatever that number --
14 38,500, you must subtract the amount plaintiff paid to
15 the defendant, which is 501500? Let's try to figure out
16 what we're really trying to say here.

17 MS. HOFFMAN: Your Honor, I'm sorry, while
18 they consult, I'm sure they can listen too. So in --
19 in -- under 2 and in line A, instead of asking them to
20 determine certain amounts, we would indicate that this
21 line is -- the parties have stipulated to the following
22 amounts. The amount the payment -- they don't -- we
23 know now that that line where it says first you must
24 determine. As a result of the proof in the case, we can
25 tell them that parties stipulate.

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1 THE COURT: What do you stipulate to?

2 MS. HOFFMAN: The amount the plaintiff -- at
3 Roman numeral ii, I'm sorry, I don't know why I said
4 two, I think it's supposed to be a one, but it would be
5 one is the amount the plaintiff paid to defendant.

6 THE COURT: Which I know is 501500.

7 MS. HOFFMAN: And then the amount -- number
8 two now would be the amount defendant paid to plaintiff
9 is \$50,000; and number three, a balance owed to
10 plaintiff is \$451,500, and then we don't --

11 THE COURT: Hold on a minute. So you want
12 that to read: First you must determine certain amounts.
13 You want me to change that --

14 MS. HOFFMAN: The parties --

15 THE COURT: Parties stipulate that --

16 MS. HOFFMAN: Small "i" would say the amount
17 the plaintiffs paid to defendant is 501 five.

18 THE COURT: Yes.

19 MS. HOFFMAN: Small ii, the amount defendant
20 paid to plaintiff is \$50,000.

21 THE COURT: Yes.

22 MS. HOFFMAN: Small iii, the balance owed to
23 plaintiff is \$451,500. There is no four and there is no
24 longer a V.

25 THE COURT: That's of course if they find

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1 liability.

2 MS. HOFFMAN: That's right, but if they find
3 liability, we made that easy. It's solely in the
4 damages section, your Honor, obviously.

5 MR. LECOURS: Your Honor, could we have one
6 second to consider that?

7 (Pause in proceeding)

8 MR. LECOURS: Your Honor, our concern is any
9 statement that the parties stipulated to an amount of
10 damages. Something characterized as damages would serve
11 to prejudice the jury in favor of finding liability.
12 That's our concern.

13 THE COURT: I always tell the jury that my
14 instruction to them on the law of damages is not to be
15 taken as an indication that they should find for the
16 plaintiff. If and only if they find for the plaintiff
17 will they award damages. I will tell them if you find
18 for the defendant, then there will be no damages. If
19 you find for the plaintiff, the parties have stipulated
20 this is the amount.

21 I mean, that's always a concern for defense
22 counsel in every case, even when there's no stipulation,
23 and I don't think a stipulation gives rise to an
24 inference that they should give damages, and I will beef
25 up my language there and say the stipulation on these

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1 figures is in no way to be taken by you that you should
2 find for the plaintiff. This is done for your ease with
3 respect to all of the numbers that you have heard. I
4 think I can take care of that, if that's your concern.

5 MR. LECOURS: And the other -- the only other
6 concern I have is instead of saying -- we stipulate to
7 the numbers that he paid and that he was -- that was
8 remitted to him, to plaintiff, but I don't know that we
9 want to -- we want the jury to do that math, that
10 subtraction to determine damages because -- we can say
11 the parties agree as to those two figures. They
12 don't -- they don't agree as to what they signify.

13 THE COURT: Okay. So I can't have a
14 stipulation. That's fine. I understand. I can at
15 least tell them the amount that the plaintiff paid to
16 the defendant was 501500, the amount of the contract was
17 723559, plus or minus 38,500 for the paint. But then if
18 you're not willing to stipulate, I can't force you. But
19 what does paragraph B say? Because right now paragraph
20 B makes no sense.

21 MR. LECOURS: I think we agree that that
22 paragraph can't remain.

23 THE COURT: What do you want paragraph B to
24 say?

25 MR. LECOURS: I think we need -- well, to the

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1 extent the Court's inclined to charge mitigation, that
2 mitigation would be subtracted from whatever the -- from
3 that math exercise of subtracting the 501500 that --
4 that plaintiff paid, subtracting the 50,000 that we
5 agree was remitted, and then that gives you 451 five,
6 which we agree that that's the result of that math, and
7 then the jury should decide, we believe, what amount of
8 mitigation was proven, if any, and --

9 THE COURT: I'm not -- you know, you did not
10 prove mitigation. You just didn't. So, it comes back
11 to the fact that you agree that if they find for the
12 plaintiff that the amount is 451500, but you don't want
13 to stipulate to that.

14 MR. LECOURS: If Your Honor wants to instruct
15 it as the number should be, if it goes to the parties
16 agree, I think we are -- we're -- I will talk to you --

17 (Pause in proceeding.)

18 MR. LECOURS: Can you give me one second, your
19 Honor?

20 THE COURT: Sure.

21 (Pause in proceeding.)

22 MR. HALLAK: Your Honor, instead of having
23 a -- a -- a directive as to what the number is in the
24 event that the plaintiff prevails, we would prefer that
25 that number be decided by the jury. So we would ask

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1 that the Court not take an affirmative directive, that
2 if the verdict were in favor of the plaintiff, that the
3 damage number has to be a particular number. But we
4 would ask that the jury be permitted to render their
5 decision on that.

6 THE COURT: Going back on paragraph 2, breach
7 of contract, say to the jury, first you must determine
8 certain amounts. I instruct you that the contract price
9 was \$723,559. The plaintiff claims that the cost of the
10 paint -- \$38,500 -- was included in the contract. The
11 defendants claim that the cost of the paint was not
12 included in the contract and included an additional
13 payment of \$38,500.

14 I instruct you that the amount that the
15 plaintiff paid to the defendant was \$501,500. I
16 instruct you that the defendant has remitted or given to
17 the plaintiff \$50,000.

18 MS. HOFFMAN: Then if we are going to do that,
19 and that's what they would like to do, then I think what
20 we have to do is provide the jury with all the amounts
21 that the defendant received on this contract, because
22 the defendant received -- and all of this is an
23 exhibit -- they received 75,000.

24 THE COURT: Please. I know -- don't -- I know
25 the number you claimed in your trial brief that they

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1 received. I'm trying to simplify this for the jury.

2 MS. HOFFMAN: I thought we were, Judge.

3 THE COURT: I don't think we are.

4 MS. HOFFMAN: That isn't something we can
5 stipulate to, then we have to show the jury that they
6 received 876 five and they stipulate to that, and that
7 the contract price is 723559. So even if the jury
8 doesn't find for the -- for the plaintiff, the defendant
9 has excess proceeds of, on our math, of 102941, and if
10 the paint isn't included, their math, 64,441.

11 THE COURT: That's going to be real easy for
12 the jury. So you're saying that you want me to tell the
13 jury that the defendant received \$876,500; that the
14 contract price was 723559 plus or minus paint; that the
15 plaintiff paid 501500; that the defendant remitted
16 \$50,000 back to the plaintiff. That's what you want.

17 MS. HOFFMAN: I think we have to stipulate at
18 least to the excess proceeds. They -- that's -- they
19 agree to that. I don't know why they also don't agree
20 that the contract damages are what they are, but they
21 have to concede that they have the excess proceeds.

22 THE COURT: I don't know what that has to do
23 with this case at this point. What's your position?

24 MR. LECOURS: Your Honor, we don't believe
25 there's any basis to instruct the jury as to amounts

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1 received in after the boat was rejected. I don't think
2 there's any basis for a verdict in damages that's over
3 the amount Mr. Salamone paid minus the amount he was
4 paid back.

5 THE COURT: You know what? You can go through
6 whatever numbers you want during your summation. I'm
7 going to tell the jury that the contract price was
8 723559 plus or minus 38,500, that the plaintiff paid
9 \$501,500, and that the defendant remitted \$50,000.
10 Period. End of story.

11 You can dazzle them with your numbers in your
12 summation. Okay?

13 Let's talk about the jury instructions.

14 Are there any objections to the jury
15 instructions as I have given you and as we amended right
16 now on that paragraph regarding damages?

17 MR. LECOURS: From the defendant?

18 THE COURT: From the plaintiff. Are there any
19 objections to the proposed charge? Other than how we
20 have just amended what I'm going to tell the jury under
21 the law of damages.

22 MS. HOFFMAN: Judge, I just wanted to be
23 certain that paragraph B is stricken in 2 and the breach
24 of contract damages. Was that something that --

25 THE COURT: Paragraph C?

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1 MS. HOFFMAN: I'm sorry. B, your Honor. B as
2 in boy, under 2. So it would be page 16, 2-B, as in
3 boy, that the defendants ask or concede that that
4 paragraph be stricken.

5 THE COURT: I'm sorry. Under B-2 on page 16,
6 B as in boy, I have breach of contract damages. I can't
7 strike that.

8 MS. HOFFMAN: Sorry, your Honor, and then
9 underneath that is -- is B. So it's B-2-B. That
10 highlighted paragraph that started is a little bit
11 clunky. Is that --

12 THE COURT: Read to me what you want me to
13 strike.

14 MS. HOFFMAN: From the amount the plaintiff
15 paid to defendant, you must subtract the contract price
16 and you must also subtract the expenses plaintiff --

17 THE COURT: I'm going to strike that. That
18 makes no senses whatever.

19 MS. HOFFMAN: Thank you. With that, your
20 Honor, then the balance of that -- continuing on to page
21 17 is fine for the plaintiff.

22 THE COURT: All right. Do you have -- so
23 other than striking that language, do you have any
24 objections to the proposed jury instructions?

25 MR. LITTLE: I only have one comment, your

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1 Honor.

2 THE COURT: Do you have any objection? I'm
3 asking if you have an objection. Tell me. Preserve the
4 record.

5 MR. LITTLE: My objection is on page 15, first
6 full paragraph. The charge instructs the jury that if
7 you determine plaintiff did not waive the right under
8 the contract, after the waiver provision, the waiver
9 instruction and the Skater was actually tendered,
10 plaintiffs were entitled to reject the Skater.

11 From there on, I think it talks about the
12 reasonable time standard, but I think that the proof at
13 trial both asserts that the Skater and the contract
14 themselves were rejected.

15 The conclusion I don't think matters, your
16 Honor, but I think that the -- the Skater wouldn't have
17 to have been tendered for plaintiff to reject the
18 contract if the delivery wasn't reasonable, and it's
19 also true that this -- that the plaintiff would have
20 had the right to reject the Skater itself if it were
21 tendered.

22 So the objection is that I don't believe it
23 mattered whether the Skater was or wasn't tendered. If
24 plaintiff rejected both the contract and the Skater,
25 then the only question is really reasonable time.

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1 THE COURT: I note your objection, but I'm
2 going to give that charge to the jury as I believe that
3 from Michigan law that I have consulted and the issues
4 involved in the case that, as I have prepared it, it is
5 accurate, and hopefully in a language that the jury will
6 follow. Any other objections?

7 MS. HOFFMAN: No, your Honor.

8 THE COURT: Any objections from the defense to
9 the proposed charge?

10 MR. HALLAK: Yes, your Honor. We have one
11 word. On page 11, second line down, the contract was
12 properly canceled due to plaintiffs' rightful rejection.
13 The word "rightful" there, I think it's a little bit
14 suggestive. On page 10, four lines up from the bottom,
15 you say plaintiffs' claim at that point they rightfully
16 rejected the Skater. I think the word "rightful" on the
17 second line of page 11 is a little suggestive, and we
18 would ask that that one word be removed.

19 THE COURT: All right. That request is
20 denied. Anything else?

21 MR. HALLAK: Nothing further, your Honor, on
22 the jury instructions.

23 THE COURT: Let's look at the jury verdict
24 form. Now, I take it plaintiffs have an objection to my
25 dismissal of the conversion and fraud?

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1 MS. HOFFMAN: We do, your Honor.

2 MR. LITTLE: We do, your Honor.

3 THE COURT: So when we look at the verdict
4 sheet, obviously there are no questions on conversion
5 and fraud, but I am noting for the record that you have
6 an objection to the dismissal of the conversion and the
7 fraud claims.

8 MR. LITTLE: That's correct. They do, your
9 Honor.

10 THE COURT: Okay. So, with that in mind, does
11 the plaintiff have any objection to the proposed jury
12 verdict form?

13 MS. HOFFMAN: Sorry.

14 MR. LITTLE: While Ms. Hoffman is looking,
15 your Honor, I just would like to note the same objection
16 with the instruction difference between tendered
17 delivery either -- tender of delivery was required for
18 the installation of the contract and/or whether there's
19 any difference. The jury verdict form is in the same
20 form as the instructions, so I just like to make that
21 same objection.

22 THE COURT: Your objection is noted.

23 MR. LITTLE: Thank you.

24 THE COURT: Any other objections to the jury
25 verdict form from the plaintiff?

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1 MS. HOFFMAN: Judge, if we could have a couple
2 of quick minutes. We were going through that when you
3 came out. So I don't intend to be long. Your Honor, we
4 were trying to work into 1-G the math that we had -- had
5 worked on in -- in the several minutes before this to
6 try and provide the jury with a way to look at --

7 THE COURT: The defendants won't consent to
8 that, so I'm going to instruct them in my verbal
9 instruction that the agreed-upon contract price was
10 723559, plus or minus 38 five, that the plaintiff paid
11 \$501,500, and that he was remitted by the defendant
12 50,000. I'm not going to plug in any numbers because
13 the defense won't consent to it, and that's their right.

14 MS. HOFFMAN: And I'm sorry. I -- so is that
15 not -- that information is going into the -- into what
16 you're reading ?

17 THE COURT: I'm going to verbally read that to
18 the jury.

19 MS. HOFFMAN: And are we -- are we indicating
20 that we can't put that information in?

21 THE COURT: I'm not putting it on the verdict
22 sheet. No. I'm going to tell them those amounts. And
23 I send a copy of my written instructions into the jury
24 room for them.

25 MS. HOFFMAN: Thank you, your Honor. I didn't

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1 know for certain.

2 THE COURT: Any objections, Counsel?

3 MS. HOFFMAN: With that understanding, Judge,
4 no, I think that this will be sufficient.

5 THE COURT: Does the defense have any
6 objections to the verdict sheet?

7 MR. HALLAK: We have just one and I think it
8 was an unintended drafting thing. In paragraph 1-D it
9 says has the defendant proved by a preponderance of the
10 evidence that plaintiffs waived the right to insist on
11 tender the Skater prior to June 27, 2017, and then it
12 says if you answer yes, please proceed to question 1-E;
13 if you answer no, please -- your deliberation are
14 complete.

15 I think if you answer yes, has defendant
16 proved by a preponderance of the evidence, then your
17 deliberations are complete, and then if you answer no,
18 then you continue to go on with the form. So I think
19 that was just a drafting mistake there.

20 MS. HOFFMAN: He's right.

21 THE COURT: All right. I'll take a look at
22 that more closely in a minute. Other than that,
23 anything?

24 MR. HALLAK: Nothing from defense. Thank you.

25 THE COURT: Okay. Because in the written

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1 instructions that I'm giving to the jury, we have made
2 changes on the damage section on page 16, and I've
3 stricken Roman numeral IV, I'm just going to give the
4 jury the general instruction on breach of contract, and
5 my law clerk is handing you a copy of that.

6 MS. HOFFMAN: Your Honor, we anticipate this
7 to be a -- just a sheet of paper that goes in or is that
8 going to be melded in here or --

9 THE COURT: What I'm going to do is -- if you
10 look at page 16, I will tell them first you must
11 determine certain amounts. The parties have stipulated
12 that, however, that the amount plaintiff paid to the
13 defendant was 501500. The parties have -- I'll say
14 agreed, okay? Not stipulated. The parties have agreed
15 that the contract price was 723559 plus or minus
16 38 five.

17 The parties have agreed that the defendant
18 remitted to the plaintiff \$50,000, and then give the
19 general contract charge that I've just handed out to
20 you.

21 MS. HOFFMAN: I wanted to make sure you guys
22 had an opportunity.

23 MR. LECOURS: Yes.

24 MS. HOFFMAN: That the language at the
25 conclusion of paragraph 3 indicates additionally, the

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1 plaintiffs still owed money to defendant on the agreed
2 contract price. That amount should not be included in
3 any damages award. The defendants received the balance
4 of that contract price from Mr. Sheker. So it never --
5 they never made a claim for us against us in this case
6 for the balance of that money. So that that instruction
7 can't be in.

8 THE COURT: Your client can't recover twice.

9 MS. HOFFMAN: Absolutely not. I'm not
10 indicating in any way that we would recover twice.
11 Absolutely not. It says additionally, if plaintiffs
12 still owed money to defendant -- we did -- on that
13 agreed contract, that amount should not be included in
14 any damages award. I just wanted --

15 THE COURT: That's correct.

16 MS. HOFFMAN: -- certain that we're not
17 indicating that it's a -- it's a balance that he owes.

18 THE COURT: That is the correct charge that
19 must be given to the jury. Any other objections,
20 Ms. Hoffman, to the routine contract language?

21 MS. HOFFMAN: So, Judge, is this final
22 paragraph in fixing the amount of damages -- this I
23 think relates to the mitigation, which I thought you had
24 struck.

25 THE COURT: In fixing the amount of damages,

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1 you should not include any loss that plaintiffs could
2 have prevented by exercising reasonable care and
3 diligence when they learned of the breach. Yeah, I'm
4 not going to charge mitigation. So, yes.

5 MS. HOFFMAN: Thank you.

6 THE COURT: That will come out.

7 MS. HOFFMAN: Nothing further then, your
8 Honor.

9 THE COURT: Any objection from the defense on
10 the general proposed contract charge?

11 MR. HALLAK: We will -- we would like to just
12 preserve for the record our objection regarding the
13 mitigation charge that Your Honor said we are not going
14 to give. Just for the record, we understand your
15 ruling.

16 We have one requested addition to that, and
17 that is in the second to last paragraph on this page
18 where it says in making this determination, you must
19 determine the contract price, the amounts paid to
20 defendant. Right there we would like the addition the
21 amounts returned to plaintiff, and then continue on with
22 the --

23 THE COURT: So the amount remitted. You're
24 talking about 50,000?

25 MR. HALLAK: That's correct, your Honor.

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1 THE COURT: I think that's reasonable because
2 I say that all throughout.

3 MS. HOFFMAN: Yes, and I don't disagree.
4 That's fine.

5 THE COURT: Remitted by the defendant. Okay.
6 So take ten minutes, and we'll sum up. Okay? I have to
7 make some changes on this. I will be back in ten
8 minutes.

9 (Following recess, 9:45 a.m.)

10 THE COURT: Who is summing up for the defense?

11 MR. LECOURS: I am, your Honor.

12 THE COURT: Make sure -- about how long -- I'm
13 not going to take a hook and take you off the stage but
14 about how long do you think you're going to be?

15 MR. LECOURS: In practice, it was about 20 to
16 25 minutes.

17 THE COURT: Okay.

18 MR. LECOURS: It might go a little slower with
19 exhibits and the speed.

20 THE COURT: Who is summing up for the
21 plaintiff?

22 MR. LITTLE: I am, your Honor.

23 THE COURT: Mr. Little, I'm going to tell you
24 something. You're very hard to understand. It's
25 probably the mask. So you need to have that microphone

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1 next to your lips, and you need to go slowly. How long
2 do you think your summation will be?

3 MR. LITTLE: Around 20 minutes or so, your
4 Honor, as well.

5 THE COURT: Okay. Let's get the jury please.
6 (Jurors present)

7 THE COURT: Good morning, folks. Thank you
8 for your patience. We have been ironing out all of the
9 legal matters that we have to take care of before the
10 case is ready for summation. It took awhile but we are
11 at that point now where the attorneys are ready to
12 deliver their summations where they will summarize for
13 you what they believe they have proven, and as I said
14 yesterday, the defense goes first. So I will recognize
15 the defense.

16 MR. LECOURS: Thank you, your Honor. May it
17 please the Court, ladies and gentlemen of the jury, good
18 morning. I want to first extend my sincere thank you on
19 behalf of Douglas Marine. You've taken the time to
20 serve in person on a jury in the middle of a pandemic,
21 and that's really a remarkable thing, and we're very
22 appreciative and grateful you've taken the time out of
23 your lives to fulfill this very important duty.

24 You've served your duty and gave us your
25 undivided attention and patience over the past several

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1 days, and we trust you to determine the facts in this
2 case, and again sincerely thank you.

3 My name is Dan Lecours, and I represent
4 Douglas Marine with my colleague, Elliot Hallak.
5 Douglas Marine made this very unique boat for Ken
6 Salamone, just the way he wanted it. He should have
7 taken the boat. He was obligated to take the boat but,
8 instead, once he had Douglas Marine do all the work, he
9 stranded them with the boat, and after he backed out of
10 the deal, all the work was done, he now has the nerve to
11 sue Douglas Marine, saying that somehow Douglas Marine
12 did something wrong. Somehow they breached the
13 contract.

14 Now, he didn't just harm Douglas Marine. He
15 put himself before his own friend, Jason Saris. He cut
16 Mr. Salamone out of any commissions so he could save
17 himself money by calling Douglas Marine direct, and then
18 he never paid Mr. Saris a nickle for all the hours that
19 he testified he put in helping Mr. Salamone. This is a
20 guy who cares about himself with no consideration as to
21 impact his actions have on everyone else.

22 On Monday, my colleague, Mr. Hallak, delivered
23 an opening statement to you, and he told you what his
24 expectation was as to what the evidence in this case
25 would show.

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1 Now, several days later, all of the evidence
2 in this case has been submitted, and what Mr. Hallak
3 told you would be proven has been proven. Let's recap
4 what he said and what the evidence has now shown.

5 So, first, Mr. Hallak told you that
6 Mr. Salamone would not be able to show you a single
7 written letter, text, or email where he complained to
8 Douglas Marine about anything before he rejected
9 delivery of the boat. There's no evidence of that.
10 They didn't show it to you. Mr. Salamone didn't even
11 testify that he ever complained about anything before.

12 He asked -- Mr. Hallak asked Mr. Salamone
13 to -- point blank to identify what if anything remained
14 to be completed by Douglas Marine as of the date he
15 rejected the boat. You heard him. He couldn't think of
16 anything. There was nothing.

17 Just like Mr. Cutsuries and Mr. Hledin told
18 you, as of June 27th, 2017, the only task that needed to
19 be completed on the boat was the rigging, and it is
20 undisputed that Jason Saris, not Douglas Marine, was
21 supposed to do the rigging. That was the initial deal.
22 It was never changed.

23 Mr. Hallak also told you that Mr. Salamone was
24 informed at the outset about the importance of selecting
25 his engines. Well, that's been confirmed as well. You

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1 saw Mr. Saris' email to Mr. Salamone in January 2016
2 telling him, quote, engines should be started on now so
3 as not to be a holdup later. That was in January 2016.

4 That was weeks after the contract was entered,
5 that was right around the time when the boat was -- the
6 beginning -- the construction was beginning.

7 Mr. Salamon knew virtually from day one that
8 he needed to act quickly. He needed to pick his
9 engines. But he failed to do that. He couldn't make up
10 his mind. Mr. Hallak told you that Mr. Salamone was
11 excited in 2017 when he received pictures of the painted
12 boat. This has been confirmed as well.

13 You saw Mr. Salamone's text messages in
14 February 2017. He was very excited. Texted awesome.
15 Unbelievable. Superb. Mr. Salamone himself confirmed
16 that he was still very much interested in the boat at
17 that point.

18 Mr. Hallak also told you that Mr. Salamone
19 changed the terms of the deal by asking for the engines
20 to be purchased by Douglas Marine, and that's true as
21 well. Every witness, including Mr. Salamone, confirmed
22 that the engines were not included in the initial deal.
23 If Mr. Salamone wanted the boat and was going to supply
24 his own engines as was provided for in the original --
25 original contract, he could have picked the boat up the

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1 minute the painting was completed, that's February 2017,
2 and you heard that confirmed by Douglas Marine's two
3 witnesses.

4 Mr. Hallak told you that Mr. Salamone did not
5 decide on the engines he wanted until 14 months after
6 the contract was entered. 14 months. That's true as
7 well. It's undisputed. You heard from Mr. Salamone and
8 Jason Saris about all the different engines that
9 Mr. Salamone considered.

10 The parties have agreed to these facts. They
11 are stipulated. You will see these facts in evidence.
12 You can review them. He considered the 850 Mercury
13 engines, and then there was thoughts about Mr. Saris
14 building engines for him, and then you recall the
15 testimony about potentially using engines for a class of
16 racing that no longer existed but their hopes, based on
17 rumors, that that class would be resurrected. None of
18 that happened. 14 months passed and then he finally
19 selected the 700s. The Mercury 700 engines.

20 Jason Saris further testified that
21 Mr. Salamone was hoping to convince the sanctioning body
22 for offshore racing to resurrect the old class. So he
23 was hoping. He was hoping. He was hoping for
24 14 months. The end of the day, Mr. Salamone admitted to
25 you that he wanted to buy the Mercury 700s essentially

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1 as placeholders that he could take out and sell when he
2 could decide on real racing, and he didn't make that
3 decision until February 2017.

4 Very little if any of this was communicated to
5 Douglas Marine in real time. They learned what
6 Mr. Salamone wanted in February 2017 when the painting
7 was finished. Mr. Hallak told you that. Once
8 Mr. Salamone made up his mind on the engines, Douglas
9 Marine promptly ordered and received them from Mercury,
10 and they got to work making the necessary modifications
11 to the boat.

12 This has been confirmed as well. This is
13 shown by documents. It's undisputed. Let's --
14 Ms. Norton, can we show the jury J17.

15 This is the invoice Mr. Cutsuries used to
16 order the Mercury engines, Mercury 700s dated March 1st,
17 2017. You can see in the "Date Wanted" field it says
18 ASAP. They ordered them as soon as he knew what engines
19 Mr. Salamone wanted.

20 Now, this is even before the \$140,000 that
21 Douglas Marine requested from Mr. Salamone to cover the
22 added costs even hit Douglas Marine's accounts.

23 Change to J16. See this email? J16.

24 March 2nd, 2017. Mr. Salamone states that the
25 wire request was completed. Douglas Marine didn't wait.

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1 They went ahead as soon as they had the information they
2 needed. They ordered engines. They got to work.

3 Mr. Cutsuries also told you that once the
4 engines arrived or that the engines arrived on -- around
5 March 14, 2017, and once they got there, Douglas Marine
6 got to work. They got to work finishing the boat.

7 Mr. Hledin explained in very -- in a lot of
8 detail, some of which I didn't understand, that the work
9 that Douglas Marine did in March, April and May to
10 finish their responsibilities under the contract and
11 complete the boat.

12 They had to modify the hatches and scoops.
13 You remember the pictures that Mr. Cutsuries circled.
14 They had to do all that work. This was all done after
15 the boat was painted. They needed to repaint those
16 parts that were affected. This was -- as Mr. Hledin
17 testified, this was time-consuming work.

18 They finished this work. They weren't
19 required to do the rigging work. Everyone agrees that
20 was Mr. Saris' job. Mr. Hallak also told you in his
21 opening statement that the boat was finished in the
22 beginning of June 2017, despite the suggestions by
23 Mr. Salamone that there were still three months of
24 rigging work to do. Rigging work that was supposed to
25 be done by Mr. Saris.

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1 The evidence indicates that the boat was done.
2 You heard Mr. Salamone assert his testimony when asked
3 what was not completed at the time you rejected
4 delivery? The only thing he can think of was that he
5 was not provided a final invoice. He could not think of
6 anything else. Nothing else.

7 You saw an invoice that was sent to him on
8 June 12th, 2017. That invoice -- the only thing that's
9 missing from it, the only thing missing from that
10 invoice was the paint. The paint that he ordered, the
11 \$38,500 custom paint job that he ordered is the only
12 thing missing on the invoice.

13 Douglas Marine was asking Mr. Salamone, an
14 experience businessman, pay your invoice, pick up your
15 boat.

16 You saw that that invoice was mailed to
17 Mr. Salamone's Connecticut address that he provided to
18 Douglas Marine to use in connection with this contract.
19 Now ask yourself: Is it strange that Mr. Salamone says
20 he received certain communications in this case that
21 were sent to that Connecticut address, the ones that
22 help his case, but he says he didn't receive the ones
23 that don't help this case?

24 You decide. That's the issues for you to
25 decide.

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1 You also saw the pictures of the completed
2 boat that Mr. Cutsuries emailed to Mr. Salamone.

3 Show the jury J23.

4 These were emailed on June 27th, 2017, at 9:44
5 in the morning. The boat is sitting on its trailer in
6 the parking lot waiting to be picked up. Now you heard
7 a lot of testimony about the completion of the boat.
8 But pictures -- 23 pages of pictures -- you can review
9 these exhibits, 23 pages of pictures are really worth a
10 thousand words.

11 The boat is done. Mr. Hallak was right in his
12 opening statement. Mr. Salamone just didn't want it
13 anymore. Mr. Hallak then told you about the only
14 significant event that occurred between the date
15 Mr. Salamone finally selected his engines and the date
16 he refused delivery. He told you that the real reason
17 Mr. Salamone rejected the delivery of the boat was the
18 tragic death of his friend. His friend died in a boat
19 race May 21, 2017. That's undisputed.

20 You have now seen the witnesses. You have
21 heard the testimony. You saw Mr. Salamone. You decide.
22 In my view, it's pretty clear what happened. You saw
23 how emotional it was for Mr. Salamone to recount the
24 events that occurred that day.

25 It's now four years later. Just imagine how

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1 emotional Mr. Salamone was just weeks -- just weeks
2 after it happened.

3 And Mr. Salamone also confirmed all of the
4 details that Mr. Hallak stated in his opening statement.
5 Mr. Raabe was someone that Mr. Salamone had gone to
6 dinner with the night before the race. He was a mentor
7 to his son. Mr. Salamone's boat had passed Mr. Raabe's
8 boat in the race just seconds before he was killed.

9 He saw the rescue team washing what he thinks
10 was his friend's blood off the back of the boat. The
11 entire race was canceled after the accident.

12 The mother of his son and racing partner, EJ,
13 told him that she was concerned for her son's safety
14 after the accident, and Mr. Salamone took the entirety
15 of the 2017 season off from racing. And now if there
16 are any doubts, if there were any doubt as to what
17 occurred, and I submit that there wasn't, this doubt was
18 removed when Mr. Salamone confessed and apologized to
19 Mr. Cutsuries and Mr. Hledin when he visited Douglas
20 Marine a year later.

21 He told them this is his first visit, first
22 visit ever to Douglas Marine. He told them why he
23 really rejected the boat. He got emotional in front of
24 them, just like he got emotional in front of you. We
25 ask you to use your common sense in determining what

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1 happened here.

2 Mr. Hallak also told you that Mr. Salamone
3 consented to the sale of the boat, including engines and
4 drives. This is undisputed.

5 You saw his June 29, 2017, email. Then that
6 same day, Douglas Marine listed the boat for sale. The
7 listing stated that the boat was available, quote, with
8 or without drives.

9 You saw the letter from Mr. Salamone's
10 attorney, the attorney he got involved in June 2017 at
11 the direction -- at his own direction. That letter
12 acknowledged that Mr. Salamone still owed Douglas Marine
13 \$222,000 under the contract. It also stated that he was
14 pleased to see the ads for the boat. Mr. Salamone also
15 said he was willing to absorb certain costs a potential
16 buyer on a different paint on the boat.

17 Mr. Hallak asked you to think about what the
18 letter doesn't say and that's important. Doesn't say he
19 breached the contract, doesn't talk about work that
20 allegedly needed to be completed by Douglas Marine. And
21 this is from a well-educated man who buys businesses for
22 a living. Just think about that.

23 Is this really how Mr. Salamone would act if
24 he thought he were in the right in denying the boat?
25 Why would he offer to absorb costs and not simply demand

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1 a refund?

2 Why would he care at all about how the boat
3 was listed or for what amount? Wouldn't he just say
4 that's your problem?

5 Mr. Hallak told you also about all the
6 difficulties Douglas Marine had finding a buyer. Again,
7 this was a custom race boat that was built to
8 Mr. Salamone's exacting specifications. You saw the
9 pictures of the boat. The blue and yellow or orange
10 boat. Douglas Marine did not receive a single
11 expression of interest in the boat until nearly nine
12 months after it was listed.

13 Then you heard about the first potential
14 interested buyer, Danny DeSantis. Douglas Marine made
15 the mistake of letting Mr. Salamone speak to him.

16 Mr. Salamone decided it would be a good idea
17 to tell Mr. DeSantis that he was considering a lawsuit
18 against Douglas Marine and, predictably, that spooked
19 him and he didn't have the time or patience for that.
20 He didn't want to make -- he didn't want to get mixed up
21 in a lawsuit. I think we can all understand that.

22 Then in March 2018 Mr. Sheker called Douglas
23 Marine and they reached a deal. Douglas Marine agreed
24 to sell the boat with the drives and transoms, but not
25 the motors, for \$300,000 if and only if Douglas Marine

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1 would agree to rig the engines at a significantly
2 reduced cost.

3 Although Mr. Sheker could afford the initial
4 payments, the payment for the rigging was beyond his
5 capabilities and took him to around the time this
6 lawsuit was filed to make the final payment. He bounced
7 a check to them. Douglas Marine even had to accept
8 credit for some landscaping work that he did for them.

9 Douglas Marine didn't want the same thing to
10 happen with Mr. DeSantis to happen again with
11 Mr. Sheker. Mr. Cutsuries told you that one of his
12 concerns about telling Mr. Salamone about the deal was
13 just that. Douglas Marine knew from experience that the
14 deal was not final, was not final until it was paid in
15 full, and Mr. Sheker hadn't done that.

16 They didn't want to get stuck holding the bag
17 again. They didn't want to get stuck with this boat for
18 a second time.

19 And the lawyers were already involved in this
20 point. They had been involved back in June of 2017.
21 You also saw letters exchanged by attorneys in
22 November 2017. You can look at them when you are back
23 in the jury room; those are J32, J46. You saw that
24 earlier letter from Mr. Salamone's attorney, J28, that's
25 the June 29th letter.

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1 At that -- so at this point, in the spring of
2 2018 -- or 2018 Mr. Salamone had already threatened
3 litigation and to bankrupt Douglas Marine.

4 Douglas Marine had nothing to gain at this
5 point by sharing freely information with Mr. Salamone.
6 Put yourself in Mr. Cutsuries' position. He was dealing
7 with a customer and Mr. Salamone, who hurled insults at
8 him, threatened to bankrupt Douglas Marine, he
9 threatened a lawsuit. He directed his attorneys to
10 write multiple letters to the company. Would you
11 respond to his text messages? I wouldn't.

12 As they explained, they were waiting for
13 Mr. Sheker to pay the balance due. They had already
14 given him the \$50,000 from the sale of the motors as a
15 good faith payment. Douglas Marine was sued before they
16 could balance their accounts. They were sued before
17 Mr. Sheker made his final payment. That's why we're
18 here.

19 Now let's talk about the steps that Douglas
20 Marine took and the costs it incurred after Mr. Salamone
21 rejected the boat.

22 Douglas Marine, as you saw, tried to sell the
23 boat right away. You saw their letter, and even though
24 they didn't need to, they sought Mr. Salamone's consent
25 for the sale, and you saw his email expressly stating in

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1 one sentence his consent.

2 Then Mr. Cutsuries listed the boat. You saw
3 that listing on powerboat listings that they had to pay
4 for. That indicated that the boat was for sale with or
5 without engines. You saw that too.

6 Then Mr. Salamone's attorney sent a letter
7 acknowledging that Mr. Salamone still owed Douglas
8 Marine over \$222,000. That amount did not include the
9 custom painting that was done. You heard Mr. Cutsuries'
10 testimony that he forgot to list that work on the
11 invoice.

12 The painting was obviously done. You saw the
13 boat in the ad on June 29th, 2017. You saw that in --
14 Mr. Hallak showed you during his opening statement.
15 That invoice for \$38,500 was subsequently sent to
16 Mr. Salamone. Mr. Salamone also acknowledged that he
17 was pleased with the online listings.

18 Douglas Marine also had to store the boat.
19 Mr. Cutsuries testified that Douglas Marine invoiced
20 Mr. Salamone for these costs. \$280 per month for
21 several months. Then Douglas Marine needed to arrange
22 for winter storage. They didn't have room. They
23 contracted with another company and paid them \$3,671.84.
24 So that -- all told for storage, that's \$4,511.84.
25 Storage for a boat that was ready to be picked up,

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1 sitting on the parking lot in its trailer.

2 Mr. Cutsuries told you how hard it is to
3 resell a custom boat; Mr. Hledin told you that as well.
4 Anyone willing to spend that much money on a boat wants
5 to make the customizations themselves. That's
6 particularly true on a race boat. You've heard in the
7 testimony in this case what happens when there's an
8 accident in racing. These owners need to get these
9 specifications right.

10 Finally, we talked about the agreement with
11 Mr. Sheker, how he would pay 300,000 for the boat
12 without motors but required that Douglas Marine rig the
13 boat at dramatically reduced cost. Mr. Hledin testified
14 that if Douglas Marine had charged Mr. Sheker the full
15 cost for the rigging work, it would have cost around
16 \$120,000. But, instead, they only charged him \$46,000.
17 You saw the invoice. It is the invoice that the
18 plaintiff didn't want to show to Mr. Cutsuries; I had to
19 do that.

20 So after subtracting the -- Mr. Hledin told
21 you that the full cost of the rigging work would have
22 cost him \$120,000 but he only charged the \$46,000. So
23 he lost \$76,000 on that deal.

24 Understandably, Mr. Salamone wants you to
25 focus your attention on the events that took place after

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1 he rejected the boat. He wants you to focus all your
2 attention on the efforts to sell the boat in Douglas
3 Marine's communications with him at that time, after he
4 threatened lawsuits, after he hired an attorney.

5 However, it's important that you remember the
6 timeline. All this is after Mr. Salamone refused
7 delivery. It's not relevant to determining whether
8 Mr. Salamone's decision to reject delivery was
9 reasonable or not.

10 That's the key question you will be asked to
11 decide here. It's very important. The key question is:
12 Was he justified in rejecting delivery of the boat? If
13 the answer to that question is no, then the events that
14 took place after delivery was rejected have no relevance
15 whatsoever.

16 Mr. Salamone was obligated to accept and pay
17 for the custom boat he ordered. If Mr. Salamone did not
18 have a good reason to reject the boat, he cannot
19 prevail. You should award him zero dollars in damages
20 because he was in the wrong.

21 You heard Mr. Salamone say that the boat
22 wasn't completed, but you saw the pictures. You saw the
23 pictures Mr. Cutsuries sent to him. They are still on
24 your screen; J23.

25 These were sent the day -- June 27th, 2017 --

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1 when they spoke on the phone. The boat is sitting on
2 the trailer waiting to be picked up. Nobody's provided
3 you a good reason why Mr. Salamone rejected it. In
4 truth, he was grieving, and he lashed out at Douglas
5 Marine. Just use your common sense here.

6 Let me leave you with a few final thoughts.
7 You heard all the detail that went into building this
8 boat. That's the reason Douglas Marine was recommended
9 to Mr. Salamone. Douglas Marine perfected a design,
10 safety, and technology of these race boats. You heard
11 about everything that needed to be done once
12 Mr. Salamone finally selected the engines that were
13 taller than anything he had previously contemplated and
14 required a lot of modification work on -- from what
15 the -- how the boat was originally constructed to
16 accommodate them.

17 There was no delay by Douglas Marine.
18 Certainly no unreasonable delay. There was just a lot
19 of work. It was a lot of work that needed to be done
20 based on these late decisions that Mr. Salamone didn't
21 make until February 2017.

22 Douglas Marine was willing to accommodate any
23 of the changes Mr. Salamone made but they certainly had
24 a right to expect that Mr. Salamone would pay for that
25 work and that he'd pick up his boat.

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1 Instead, after Douglas Marine had done
2 everything he requested, and once the boat was
3 completed, he refused to pick it up and pay for it. You
4 saw the boat sitting in the parking lot, ready to be
5 picked up. The suggestion that Douglas Marine somehow
6 breached the contract by doing everything Mr. Salamone
7 asked is untrue.

8 The only person who breached is Mr. Salamone,
9 when he changed his mind and refused to pick up his
10 boat. And then after a couple months after he picked
11 out -- picked out and had Douglas Marine order engines
12 that required major modifications to the boat.

13 Put yourself in Douglas Marine's shoes. Think
14 about what it's like to do a really big job for someone
15 and then get stiffed. Building a boat like this is a
16 monumental task. These things cost more than most
17 people's houses.

18 Douglas Marine is a small business Mr. Hledin
19 has run since the 1970s. The financial impact that
20 Mr. Salamone refusing to pick up the boat and pay for
21 what he owned is a big deal for them.

22 When you go back in the jury room, the Court's
23 going to provide you with a verdict form, which is a
24 worksheet where you will put your findings, and the
25 Court will instruct you as to how to fill that form out.

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1 I just want to briefly talk about that form
2 before I leave you.

3 The first question you'll be asked to answer
4 is: Did plaintiffs establish by a fair preponderance of
5 the credible evidence that plaintiff substantially
6 performed their obligations under the contract? We
7 submit to you that the answer is no. Mr. Salamone
8 didn't pay for the boat. He didn't pick up the boat.
9 He didn't make his decisions in a timely manner.

10 Second question, if you get to it: If you
11 answer the first question no, you're done. Second
12 question: Did plaintiffs establish a fair preponderance
13 of the evidence the defendant breached the contract by
14 failing to tender the Skater within a reasonable time?
15 The answer again is no. They told Mr. Salamone that the
16 boat was ready by sending him an invoice as soon as they
17 reasonably could, right after the race, where his friend
18 died.

19 THE COURT: Mr. LeCours, I'm hesitant to
20 interrupt you, but do you intend to read the entire
21 verdict sheet? Because we have made some changes after
22 our charge conference, particularly with respect to the
23 issue that your partner raised on one of the questions,
24 and I don't believe you have the new copy yet.

25 MR. LECOURS: I don't. I don't, your Honor,

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1 and I -- I am pretty much done talking about the verdict
2 form.

3 THE COURT: I apologize. I just wanted to
4 make sure.

5 MR. LECOURS: And again, the Court will
6 instruct you on how to fill out the form and how to work
7 through the form, but those two questions, they are key
8 questions.

9 Plaintiff was required to prove those items
10 and they didn't prove those items. For that reason, we
11 ask that you return a verdict in favor of Douglas
12 Marine.

13 As I stated when I began, Douglas Marine,
14 Mr. Hallak, and I truly thank you. We thank you for
15 your patience and your service. We ask for a verdict
16 for Douglas Marine, and we believe it's the only verdict
17 that is supported by the evidence you have heard. Thank
18 you all for your attention.

19 THE COURT: Thank you, sir. I now recognize
20 plaintiffs' counsel.

21 MR. LITTLE: Good afternoon, ladies and
22 gentlemen of the jury. As you know by now, we represent
23 the plaintiffs, Kenneth Salamone and RUFSTR Racing, LLC.
24 We have been here a couple of days now. And you heard
25 opening statements, testimony, stipulated facts,

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1 reviewed documentary evidence presented by the parties
2 and have heard defendant's summation. We are certainly
3 approaching the finish line now.

4 Before I begin plaintiffs' summation, I would
5 like to thank you on behalf of the plaintiffs, Kenneth
6 Salamone, RUFSTR Racing, LLC, and my co-counsel,
7 Ms. Hoffman. You have been an attentive jury over these
8 last -- what seem like a -- longer than three days and
9 your service on the jury is greatly appreciated.

10 At the outset of this case, plaintiffs summed
11 up four points as to liability here. Because the
12 defendant failed to timely deliver the boat, because the
13 boat was not timely delivered by defendants --
14 plaintiffs -- plaintiffs rejected the boat and the
15 contract, that defendant misinformed and misled
16 plaintiffs when it harbored it and sold the boat, and
17 that defendant ultimately received \$886,500 for the
18 boat, engines and drives; \$501,500 of which was from
19 plaintiffs.

20 Think about that for a second. The defendants
21 received \$876,500 for a boat. They weren't even
22 entitled to that amount of money under the contract with
23 Mr. Salamone. They were entitled to \$102,000 and change
24 less and they paid, including the \$50,000, that they
25 repaid to Mr. Salamone.

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1 The testimony and documentary evidence
2 presented at this trial not only supports but affirms
3 that Mr. Salamone rightfully and -- rejected a boat that
4 was not delivered timely.

5 First, there's no dispute between the parties
6 that a contract existed. There is also no dispute that
7 plaintiffs made each of the first two installment
8 payments that he was required to make under the terms of
9 the contract, totaling \$361,500. Not only does
10 Mr. Salamone's testimony confirm those amounts, those
11 are stipulated amounts.

12 There is no dispute, and it is stipulated,
13 that the plaintiffs paid \$140,000 for the engines and
14 drives. The evidence that you were presented shows that
15 the defendant did not deliver this boat to plaintiffs
16 timely, and that plaintiffs rejected the boat and
17 terminated the contract.

18 The evidence from both Mr. Salamone and
19 Mr. Saris showed that the plaintiff terminated this
20 contract in June of 2017 after, both witnesses
21 testified, that they learned in a conversation with
22 Mr. Cutsuries that the boat would take approximately
23 three more months. Mr. Cutsuries, in his direct
24 examination by Ms. Hoffman, didn't recall whether he
25 made that statement or not, and he acknowledged that

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1 Mr. Saris may very well be telling the truth.

2 The very next day, Mr. Cutsuries testified
3 that the boat was complete in June -- on June 27th,
4 2017. Both versions of Mr. Cutsuries's testimony can't
5 be correct.

6 You have also reviewed documentary evidence
7 that shows that the boat was delayed. The defendants
8 acknowledged the boat was delayed; they just blame the
9 plaintiff.

10 Again, the evidence is clear, plaintiffs
11 rejected the boat and the contract on June 27th, 2017.
12 The evidence also shows that plaintiff attempted to
13 mitigate his damages by consenting to the sale. He
14 spoke with potential purchasers. He followed up with
15 the defendants. He asked what's going on with the boat?
16 Have you heard from Mr. DeSantis? Any news yet?

17 I want to take a second again, and I know that
18 this is -- has been repeated multiple times with respect
19 to the numbers, but I think it's important. The
20 evidence shows here -- the plaintiff is required to show
21 that he's been damaged. The evidence shows that the
22 plaintiff has. The contract price for the boat that
23 Mr. Salamone was required to pay was \$723,559. Again,
24 defendant received \$300,000 from the plaintiff and
25 that's not disputed. Another \$140,000 for engines and

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1 drives, which is not disputed. \$61,000 -- \$61,500 which
2 is not disputed.

3 Defendant also received \$300,000 from
4 Mr. Sheker in the subsequent sale of the boat, and
5 another \$75,000 from Happy Days Marina.

6 In its opening statement, defendant advised
7 you that it was plaintiff and not the defendant that
8 delayed the construction of the boat. The testimony and
9 documentary evidence that you were shown does not bear
10 this out. None of the documents received into evidence,
11 including the text message chains in Joint Exhibit 43
12 and the emails and testimony concerning those documents,
13 show that defendant never advised plaintiffs that their
14 actions were holding up construction of the boat,
15 whether it be for paint, engines, or otherwise.

16 The contract here was entered into in December
17 of 2015. In March of 2016, only three months later,
18 plaintiff asked the defendant when it needed the paint
19 codes, and the defendants responded and testified that
20 it would be a while.

21 Plaintiff, when he was finally asked for the
22 paint codes, responded in two hours. Mr. Cutsuries
23 testified that the approximately two-week timeframe it
24 took plaintiff to respond for the graphics as opposed to
25 painted, caused an over six-month delay in the boat not

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1 being painted.

2 This cannot be the reason the boat was
3 delayed. There are no communications in an email or
4 text messages between plaintiffs and defendants marked
5 as joint exhibits where defendant advised either, one,
6 that plaintiff needed engines, or two, that now having
7 the engines before plaintiff authorized them to be
8 ordered delayed the boat in any way.

9 So how are we to believe that the engines
10 caused the boat's delay? The defendant never asked for
11 them until February 28th, 2017. The plaintiff approved
12 the purchase and paid for the engines immediately.

13 Defendant also attempts to manipulate the
14 death of Mr. Salamone's friend into an excuse for
15 failure to tender delivery of the boat. Much has been
16 made in this case about the tragic accidents that killed
17 Mr. Salamone's racing friend. You heard Mr. Salamone
18 and Mr. Saris testify firsthand as to his state of mind
19 after the accident. Both witnesses told you it
20 reaffirmed his commitment to this Skater boat.

21 Instead, the defendant attempts to manipulate
22 that commitment by Mr. Salamone into a basis for their
23 rejection of the contract.

24 This is outrageous and should not be
25 countenanced. There's absolutely no proof provided by

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1 defendant is for their story. Importantly, you were
2 read Mr. Hledin's deposition transcript testimony where
3 he testified that Mr. Salamone never told him that he
4 rejected the boat because of his friend's death. But,
5 rather, Mr. Hledin testified that he just knew it wasn't
6 the reason. Mr. Hledin used some pretty crass language
7 with respect to Mr. Salamone in that conversation as
8 well.

9 The defendant is never demonstrated that
10 you -- that it delivered or tendered the boat to
11 Mr. Salamone. Nothing tells you that. The pictures
12 aren't inclusive proof that that boat was done. The
13 defendant testified that it's put on the tilt trailer to
14 save space in the warehouse. It could have been rolled
15 out just as easily.

16 Not one email or text is sent to Tony
17 Cutsuries to tell Mr. Salamone that the boat is done.
18 It defies any reasoning. Tony Cutsuries and Kenneth
19 Salamone emailed and texted as a matter of routine.
20 Those emails and texts are in evidence. When
21 Mr. Salamone was asked for a payment, he was asked in a
22 text or an email. Mr. Salamone paid it. The contract's
23 at issue in this case. Other than the June 12, 2015,
24 contract, plaintiffs submit were sent by electronic
25 mail.

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1 By the time that Mr. Salamone rejected the
2 boat, he had been waiting for an update. That was never
3 made by text or email.

4 The defendant would now have you determine
5 that based on an invoice to Mr. Salamone on June 12th of
6 2017 via U.S. post office to ask for payment on an
7 invoice.

8 The defendant stipulates at joint fact number
9 53, which will be submitted to the jury, that the
10 June 12th, 2017, invoice is not a final invoice. What
11 the defendant does show us on June 27, 2017, is a series
12 of photos of Mr. Salamone's boat on his trailer. It is
13 only then that the defendant asserts the boat is done.

14 The plaintiff and Mr. Saris both testified
15 that Mr. Cutsuries told them on the day prior that the
16 boat was not done and would be another three months.
17 During his testimony, Mr. Cutsuries gave many
18 inconsistent statements. We briefly detailed the most
19 important point. Mr. Cutsuries didn't know whether or
20 not Mr. Saris or Mr. Salamone's -- in the conversation
21 with Mr. Saris and Mr. Salamone that he was -- that he
22 advised that the boat would take three months. It was
23 the next day that he did.

24 Mr. Cutsuries also didn't, in connection with
25 selling the boat, have to tell Mr. Salamone who the

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1 buyer's name was to tell him the truth.

2 Defendant, even in its closing, wants you to
3 believe what a terrible person Mr. Salamone is. But
4 these fabrications about Mr. Salamone are simply not
5 true.

6 They would have -- Mr. Hledin or the defendant
7 would have you believe that Mr. Salamone, through
8 Mr. Hledin's testimony, threatened the plaintiff or the
9 defendant to lock their doors. To make them file for
10 bankruptcy. And then immediately after, they sent him
11 letters and emails. Not one of which references that
12 they were threatened.

13 Mr. Hledin acknowledged in his testimony that
14 Mr. Salamone didn't have the balls to tell him. What
15 the defendant would have you believe about Mr. Salamone
16 again is simply not true.

17 They happily invited him out to their Michigan
18 facility in 2018. Their actions and written words tell
19 you all you need to know about Mr. Salamone. He's a
20 loving father. Caring of his son. A boat racer. He
21 served this country. His text messages back and forth
22 to the defendants are not angry or threatening, nor are
23 his emails.

24 Mr. Salamone consented to the sale of the boat
25 and tried to follow up. The documentary evidence that

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1 you have doesn't support the story that the defendant
2 would have you believe of Mr. Salamone.

3 Mr. Salamone has always taken the high road in
4 his rejection of the contract and, again, that
5 documentary evidence bears that out.

6 The evidence also shows that plaintiff owned
7 the engines, drives and transoms and their proceeds.
8 There's no dispute that plaintiffs paid 140,000 for the
9 engines and drives. There's no dispute they were sold.
10 There's no dispute that only \$50,000 of the proceeds
11 were ultimately paid to Mr. Salamone.

12 In addition to the -- to the \$50,000,
13 Mr. Salamone received an additional \$25,000 for the
14 engines. The evidence clearly shows that the drives and
15 transoms were sold as part of the defendant's subsequent
16 sale and garnered \$78,230. None of that money was paid
17 back to the plaintiff.

18 To sum up, there is no question here that a
19 contract exists. The evidence that was submitted to you
20 clearly shows that there was a contract and it's
21 stipulated to.

22 The amounts that Mr. Salamone paid and the
23 amounts that were ultimately due to the defendant are
24 clear. There's no dispute. The dispute arises with
25 respect to when the boat was done. The evidence shows

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1 the boat was not done when it was rejected by
2 Mr. Salamone. And as a result, we would respectfully
3 request the Court or the jury enter a verdict in favor
4 of the plaintiff for the full contractual balance that
5 is due as instructed by the Court. Thank you.

6 THE COURT: Thank you. Members of the jury, I
7 have to instruct you on the law. It's a little bit
8 lengthy. Would you like to stretch or use the restroom
9 before I do that? Or do you want me to go right to it?
10 What's your consensus? Anybody need a break? Anybody?
11 Okay. Then I'll just go into instructing you on the
12 law; we will be breaking at 11 a.m., however.

13 Members of the jury, if you ever cannot hear
14 me during this instructions, just raise your hand and I
15 will raise my voice. You must base your verdict on
16 instructions that I am giving you now and not on the
17 preliminary instructions I gave you at the beginning of
18 the case. You will have a copy of these instructions in
19 the jury room in case you would like to review them
20 during your deliberations. So everything that I'm
21 saying to you, you will have a copy of it in the room
22 while you deliberate.

23 Now that you have heard all the evidence and
24 the arguments of counsel, it is my duty to instruct you
25 on the law applicable to this case. As I said, the law

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1 is a little bit lengthy and if at any time you want to
2 stand and stretch while I'm reading, it will not in any
3 way bother me.

4 Your duty as jurors is to determine the facts
5 of the case on the basis of the admitted evidence. Once
6 you have determined the facts, you must apply the law as
7 I am now instructing you to those facts.

8 You must consider and apply all of these
9 instructions. You may not elect to apply some
10 instructions and omit others. It is the application of
11 these instructions in their entirety that states the
12 law.

13 You should not concern yourselves with the
14 wisdom of any law or rule of law that I give you. You
15 are bound to accept and apply the law as I give it to
16 you whether or not you agree with it. As I said on day
17 one, you are the supreme finders of the fact. No one,
18 not even myself, can interfere with that, but on the
19 law, you must accept the law as I instruct you.

20 In deciding the facts of this case, you must
21 not be swayed by feelings of bias, prejudice, or
22 sympathy toward either the plaintiffs or the defendant.
23 And let me make clear that I'm saying "plaintiffs" with
24 an "s" on it because the plaintiffs are Mr. Salamone and
25 a limited liability corporation of his called RUFSTR.

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1 Okay? So that's why I'm saying plaintiffs instead of
2 just plaintiff.

3 So to repeat, in deciding the facts of the
4 case, you must not be swayed by feelings of bias,
5 prejudice, or sympathy toward either plaintiffs or
6 defendant. You are not to consider what the parties' or
7 the public's reaction to your verdict may be, whether it
8 will please or displease anyone, be popular or
9 unpopular, or, indeed, any consideration outside the
10 case as it has been presented to you in this courtroom.

11 You should consider only the evidence -- both
12 the testimony and all of the exhibits -- and apply the
13 law as I now give it to you. The proper administration
14 of justice requires that you carefully and impartially
15 consider all of the evidence in the case, follow the law
16 as the Court states it, and render a decision based upon
17 the application of the law to the facts as you find them
18 to be.

19 Nothing I say in these instructions should be
20 taken as an indication that I have any opinion about the
21 facts of this case. It's not my function to determine
22 the facts. It's yours.

23 In addition, you must not infer from anything
24 I have said or done during this trial that I hold any
25 views for or against either the plaintiffs or the

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1 defendant. In any event, any opinion that I might have
2 would be totally irrelevant to your decision.

3 Now, our courts operate under an adversary
4 system which we hope that the truth will emerge through
5 the competing presentations of opposing parties. It is
6 responsibilities of the attorneys to press as hard as
7 they can for their respective positions. It is their
8 role to call your attention to those facts which are
9 most helpful to their side of the case.

10 In fulfilling their rule, they have not only
11 the right but also the obligation to make objections to
12 the introduction of evidence that they believe is
13 improper. The application of the rules of evidence is
14 not always clear, and lawyers will often disagree. It's
15 been my job as judge to resolve these evidentiary
16 disputes. It's important for you to realize, however,
17 that my rulings on evidentiary matters have nothing to
18 do with the ultimate merits of the case, and they are
19 not to be considered as points scored for one side or
20 the other.

21 Also, one cannot help but become involved with
22 the personalities and the styles of the attorneys. But
23 it is important for you as jurors to recognize that this
24 is not a contest between attorneys. You are to decide
25 this case solely on the basis of the evidence, and

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1 remember that the attorneys' statements and
2 characterizations of the evidence are not evidence.

3 Insofar as you found the opening and closing
4 statements helpful, as I said yesterday, take advantage
5 of them. But it is your memory and your evaluation of
6 the evidence that counts.

7 Questions asked by the attorneys are not
8 evidence. Only the witnesses' answers in response to
9 the questions are evidence. As I stated earlier, your
10 duty is to determine the facts based on the evidence I
11 admitted. The term "evidence" includes the sworn
12 testimony of the witnesses that you heard from the
13 witness stand and all of the exhibits that were received
14 in evidence.

15 Although you should consider only the admitted
16 evidence, you may draw inferences from the testimony and
17 exhibits which are justified in light of your common
18 experiences. As I explained in my preliminary
19 instructions, the law recognizes two types of evidence:
20 direct and circumstantial.

21 Direct evidence is the testimony of one who
22 asserts personal knowledge, such as an eyewitness.
23 Circumstantial or indirect evidence is proof of a chain
24 of events which points to the existence or non-existence
25 of certain facts.

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1 The law does not distinguish between the
2 weight to be given to direct or circumstantial evidence,
3 nor is a greater degree of certainty required of
4 circumstantial evidence than of direct evidence. You
5 may rely on either type of evidence in reaching your
6 decision.

7 If during the course of the trial I told you
8 to disregard any testimony or I struck any exhibits or
9 testimony from the record, such testimony or exhibits
10 are not evidence and may not be considered.

11 Now, to say that a party has a burden of proof
12 on a particular issue means that considering all of the
13 evidence in the case, that party's claim on that issue
14 must be established by what we call a fair preponderance
15 of the credible evidence.

16 The credible evidence means the testimony and
17 the exhibits that you find worthy of belief. A
18 preponderance means the greater part of the evidence.
19 This does not mean the greater number of witnesses or
20 the greater length of time taken by other -- by either
21 side.

22 The phrase preponderance of the evidence
23 refers to the quality of the evidence, its weight, and
24 the effect that it has on your minds. In order for a
25 party to prevail on an issue on which it has been the

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1 burden of proof, the evidence that supports its claim on
2 that issue must appeal to you as more nearly
3 representing what happened than the evidence opposed to
4 it. If it does not, or if it weighs so evenly that you
5 are unable to say that you are -- pardon me -- that you
6 are unable to say that there is a preponderance on
7 either side, you must decide the question against the
8 party who has the burden of proof and in favor of the
9 opposing party.

10 You have now had the opportunity to observe
11 all of the witnesses. It's now your job to decide how
12 believable each witness was. You are the sole judges of
13 the credibility of the witnesses and the importance of
14 his or her testimony.

15 Now, in evaluating a witness's testimony, you
16 should use all the tests for truthfulness that you would
17 use in determining matters of importance to you in your
18 everyday life. You should consider any bias or
19 hostility that the witness may shown for or against
20 either party, as well as the interest that the witness
21 may have in the outcome of the case. You should
22 consider the opportunity that the witness had to see,
23 hear, and know the things about what the witness
24 testified, and the accuracy of the witness's memory, the
25 candor or lack of candor, the reasonableness, and the

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1 probability of the witnesses testimony. The testimony's
2 consistency or lack thereof, and its corroboration or
3 lack of corroboration with other credible testimony.

4 Inconsistencies or discrepancies in the
5 testimony of a witness or between the testimony of
6 different witnesses may or may not cause you to
7 discredit such testimony. Two or more persons
8 witnessing an incident or a transaction may see or hear
9 it differently, an innocent misrecollection. Like
10 failure of recollection is not an uncommon experience.

11 In weighing the effect of any discrepancy,
12 always consider whether it pertains to a matter of
13 importance or an unimportant detail, and whether the
14 discrepancy results in an innocent error or an
15 intentional falsehood.

16 If you were to find that any witness willfully
17 testified falsely as to any material fact, that is, to
18 an important matter, the law permits you to disregard
19 completely the entire testimony of that witness upon the
20 principle that one who testifies falsely about one
21 material fact is likely to testify falsely about other
22 important matters. You are not required, however, to
23 consider such a witness totally unworthy of belief. You
24 may accept so much of that witness's testimony as you
25 deem true and disregard what you feel is false.

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1 By the processes which I have described to
2 you, you, as the sole judges of the facts, decide which
3 of the witnesses to believe, which witnesses you will
4 not believe, what portion of their testimony you accept,
5 and what weight you will give to that testimony.

6 In other words, what you must try to do in
7 deciding credibility is to size up a witness in light of
8 the witness's demeanor, the explanations given, and all
9 of the other evidence in the case.

10 Remember, you should always use your good
11 common sense, your good judgment, and your own life
12 experience. Also remember that the existence or
13 non-existence of the facts, as I said, is not determined
14 by the number of witnesses called. Your concern must
15 always be with the quality, not the quantity, of the
16 evidence.

17 Now, an interested witness is a person who has
18 an interest in the outcome of the trial. Here,
19 plaintiffs and the defendant are interested witnesses.
20 An interested witness is not necessarily less believable
21 than a disinterested witness. The fact that he is
22 interested in the outcome of the case does not mean that
23 he has not told the truth. It's for you to decide from
24 the demeanor of the witness on the stand, and such other
25 tests as your experience dictates, whether the testimony

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1 has been influenced intentionally or unintentionally by
2 that interest.

3 You're not required to reject the testimony of
4 such a witness. You may accept all or part of his
5 testimony as you find it reliable and reject such part
6 as you find unworthy of acceptance.

7 Now, a witness may be discredited or impeached
8 by contradictory evidence or by evidence that at some
9 other time the witness has said or done something or has
10 failed to do or say something that is inconsistent with
11 the witness's present testimony.

12 If the witness is not a party to this action,
13 such prior inconsistent, out-of-court statements may be
14 considered for the sole purpose of judging the witness's
15 credibility. However, it may not be considered as
16 evidence of proof of the truth of the statement.

17 On the other hand, when the witness is a party
18 to the case and by such statement or other conduct
19 admits such fact or facts against the witness's
20 interest, then such statement or other conduct, if
21 knowingly made or done, may be considered as evidence of
22 the truth of the fact or facts so admitted by such
23 party, as well as for the purpose of judging the
24 credibility of the parties as a witness.

25 As I've said, if you believe any witness has

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1 been impeached and thus discredited, you may give the
2 testimony of that witnesses such credibility if any you
3 think it deserves.

4 If a witness is shown knowingly to have
5 testified falsely about any material matter, you have
6 the right to distrust that witness's testimony and you
7 may reject all of the testimony of that witness or give
8 it such credibility as you think it deserves.

9 Now, a stipulation is an agreement between the
10 parties that a certain fact is true. You must regard
11 such agreed facts as true. I'm going to send in to you
12 99 facts that the parties got together on and agreed to.
13 So those will be in the jury room for you to look at.

14 Your verdict must be based solely on the
15 evidence developed at trial or the lack of evidence.
16 Under your oath as jurors, you're not to be swayed by
17 sympathy. You are to be guided solely by the evidence
18 in the case and the crucial question that you must ask
19 yourselves as you sift through the evidence is: Have
20 plaintiffs proven defendant's liability by a fair
21 preponderance of the evidence?

22 In reaching your decision, it would be
23 improper for you to consider any personal feelings that
24 you might have about the party's race, religion,
25 national origin, sex, or age. It would be equally

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1 improper for you to allow any feelings you might have
2 about the nature of the claims to interfere with your
3 decision-making process.

4 The law does not require any party to call as
5 witnesses all persons who may have been present at any
6 time or place involved in the case or who may appear to
7 have some knowledge of the matters at issue in trial,
8 nor does the law require any party to produce as
9 exhibits all papers and things mentioned in this case.

10 Some of the testimony before you is in the
11 form of depositions which have been received in
12 evidence. A deposition is simply a procedure where,
13 prior to trial, the attorneys for one side may question
14 a witness or an adversary party under oath before a
15 court reporter. This is part of what we call pretrial
16 discovery, and each side is entitled to take
17 depositions.

18 You may consider the testimony of a witness
19 given at a deposition according to the same standards
20 you would use to evaluate the testimony of a witness
21 given at trial.

22 Now, I'm going to talk to you about breach of
23 contract. The parties agree that they entered into a
24 valid and enforceable contract for the sale of a new
25 Skater 388 race boat on December 7th, 2015.

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1 Plaintiffs claim that defendant breached that
2 contract by failing to deliver the Skater within a
3 reasonable time. Plaintiffs' claim at that point, they
4 rightfully rejected the Skater and terminated the
5 contract.

6 A cancelation occurs when either party puts an
7 end to the contract for breach by the other and its
8 effect is the same as that as a termination except that
9 the canceling party also retains any remedy for breach
10 of the whole contract or an unperformed balance.

11 In this case, you must decide whether the
12 contract is properly canceled through plaintiffs'
13 rightful rejection of the Skater. Defendant claims that
14 plaintiffs' rejection was wrongful, and plaintiffs thus
15 breached the contract by repudiating their obligations
16 under the contract before performance was due.
17 Repudiation occurs when a buyer distinctly tells or
18 through its actions clearly shows the seller that it
19 does not intend or is unable to perform the contract or
20 any part of the contract and the loss of performance
21 substantially impairs the value of the contract to the
22 seller.

23 Plaintiffs bring their claims pursuant to
24 Michigan law. Under Michigan law, the plaintiffs have
25 the burden of proving, A, that the contract exists; B,

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1 plaintiffs substantially performed their obligations
2 under the contract; C, defendant breached the contract;
3 and D, plaintiffs were damaged by the breach of
4 contract.

5 First element: Existence of a contract. A
6 contract for the sale of goods exists when a seller
7 offers to sell goods and a buyer accepts that offer.
8 The parties here have stipulated that plaintiffs have
9 satisfied this element. As such, you need not concern
10 yourselves with this element.

11 Second element: Plaintiff substantially
12 performed. In considering the second element of
13 plaintiffs' claim, that is, whether the plaintiff
14 substantially performed their obligations under the
15 contract, plaintiffs must establish by a preponderance
16 of the evidence that they substantially performed all of
17 their obligations under the contract prior to when they
18 allege defendant breached the contract.

19 Each party to a contract has a duty to perform
20 his or her obligations under the contract. A contract
21 is breached or broken when a party does not
22 substantially perform what the party promised to do in
23 the contract. Plaintiffs cannot rightfully reject the
24 Skater if they already breached the contract.

25 You must therefore determine whether

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1 plaintiffs substantially performed their obligations
2 under the contract. When I say that plaintiffs must
3 have substantially performed the contract or that
4 substantial performance of the contract is required, I
5 mean that although there may have been some deviations
6 or omissions from performance called for by the language
7 of the contract, defendant received the important and
8 acceptable benefits for which the contract was made.

9 The extent of non-performance is to be viewed
10 in light of the full performance promised. If a defect
11 or uncompleted performance is of such extent and nature
12 that there has not been practical fulfillment of the
13 terms of the contract, then there has not been
14 substantial performance.

15 If you determine that plaintiffs did not
16 substantially fulfill their obligations under the
17 contract, then your verdict should be for the defendant,
18 and plaintiffs are not entitled to any damages as to
19 this claim.

20 Third element: Defendant -- if defendant
21 breached the contract. If you have determined that
22 plaintiff substantially performed their obligations
23 under the contract, then you must determine whether the
24 defendant breached the contract by not tendering or
25 delivering the Skater in a manner that conforms to the

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1 contract.

2 The parties agree that the contract does not
3 include a date for delivery; therefore, you must
4 determine whether the Skater was tendered at all in, and
5 if so, if it was tendered within a reasonable time.
6 "Tender" means that the seller has put and holds goods
7 at the buyer's disposal and has given the buyer any
8 notification reasonably necessary to enable them to make
9 delivery.

10 What is a reasonable time? is a question for
11 you to decide based on the evidence, bearing in mind the
12 subject matter of the contract and the surrounding
13 circumstances. Note that the defendant claims that the
14 tender of delivery of the boat prior to June 2017 was
15 excused because the plaintiffs waived their performance.

16 To excuse non-performance, defendants must
17 prove that plaintiffs voluntarily and knowingly gave up
18 their rights to insist on tender of delivery earlier
19 than that date. In other words, plaintiffs must have
20 known that they had the right to go -- pardon me.
21 Plaintiffs must have known that they had the right to
22 insist on the tender of the delivery by defendants
23 before June 2017 but, nevertheless, agreed to give up
24 this right.

25 If plaintiffs waived this right, they were not

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1 entitled to cancel the contract. A waiver may be
2 expressly stated or it may be implied by acts or conduct
3 indicating an intent not to enforce the contractual
4 right such that a reasonable person would think that
5 performance was no longer required.

6 A waiver of a substantial right requires
7 consideration. Consideration is something of value
8 given in exchange for the promise. However, an act done
9 in the past cannot be consideration for a later
10 contract. Doing or promising to do what one is already
11 obligated to do is not consideration. The consideration
12 does not need to be expressed in writing.

13 Thus, if you determine that defendant did not
14 tender the Skater at a reasonable time, you must also
15 determine whether plaintiffs waived this right.

16 If you determine that plaintiffs waived their
17 right to tender the Skater's delivery prior to June 2017
18 by the defendant, then you have determined that
19 defendant did not breach the contract and plaintiffs
20 could not rightfully reject the Skater. You must then
21 determine whether plaintiffs repudiated their
22 obligations under the contract before performance was
23 due.

24 Defendant claims that the plaintiffs breached
25 the contract by repudiating their obligations under the

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1 contract before performance was due. Repudiation occurs
2 when a buyer distinctly tells or through its actions
3 clearly shows the seller that it does not intend or is
4 unable to perform the contract or any part of the
5 contract and the loss of performance substantially
6 impairs the value of the contract to the seller.

7 You must determine whether the plaintiffs
8 breached the contract by repudiation. If you
9 determine that plaintiffs did not waive their rights
10 under the contract and the Skater was actually tendered,
11 plaintiffs are entitled to reject the Skater if the
12 Skater or the manner, time, or place of its tender did
13 not conform to the contract and plaintiffs notified
14 defendant of the nonconformity within a reasonable time
15 after tender.

16 Plaintiffs have the burden of proving that
17 they gave defendant the required notification. If you
18 determine that the time and place of the tender
19 conformed to the contract or that plaintiffs failed to
20 notify defendant of their rejection within a reasonable
21 time after tender, then plaintiffs have breached the
22 contract.

23 If you determine that the time or place of the
24 tender did not conform to the contract, and that
25 plaintiffs notified the defendant of their rejection

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1 within a reasonable time after tender, then defendant
2 has breached the contract.

3 Now let me talk to you about damages. If you
4 find that plaintiffs did not establish each of the
5 elements of its breach of a contract claim, then your
6 verdict should be for the defendant, and plaintiffs are
7 not entitled to any damages.

8 If you find that the defendant breached the
9 contract by failing to make delivery of the goods called
10 for in the contract, you must compute the plaintiffs'
11 damages as discussed below.

12 Now, although I am instructing you on the law
13 of damages, it's entirely up to you to decide what to do
14 on that account. If you believe that the plaintiff has
15 carried his -- their burden of proof and should be
16 awarded damages, then you will take into consideration
17 the damages charge. If you believe that the plaintiff
18 has not proven his case -- their case by a preponderance
19 of the evidence, then it will be up to you to decide
20 that you are not going to award damages.

21 So just because I'm instructing you on damages
22 is not an indication of how you should find. It's to
23 assist you in terms of answering the questions on
24 verdict sheet that I'm giving you, and this is last
25 thing I'll say before we take our 11 a.m. break; it's

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1 very brief.

2 I instruct you that the parties have agreed
3 that the contract price was \$723,559. That's \$723,559.
4 Plaintiffs assert that the cost of the paint was
5 included in the \$723,559. Defendant asserts that
6 \$38,000 is not reflected in the \$723,559. If you find
7 that the cost of the paint was not reflected in the
8 invoice of June 12th, 2018, add \$38,500.

9 I instruct you that the parties agree that the
10 amount plaintiffs paid to the defendant was \$501,500.
11 \$501,500. That is the amount plaintiffs paid to the
12 defendant. And the amount defendant paid to plaintiffs
13 was \$50,000.

14 If plaintiffs have proven by a preponderance
15 of the evidence that defendant is liable for breach of
16 contract, then you must determine the amount of damages
17 which plaintiffs are entitled to for that claim.
18 However, you should not infer that plaintiffs are
19 entitled to recover damages, as I said, merely because
20 I'm instructing you on the elements of damages. It is
21 exclusively your function to decide the issues of
22 liability outlined above, and I'm instructing you on
23 damages only so you will have guidance should you decide
24 that plaintiffs are entitled to recovery.

25 A successful plaintiff in a breach of contract

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1 claim is entitled to recover damages that would place
2 that plaintiff in the same position as if the contract
3 had not been breached. In other words, the plaintiff
4 may recover those damages naturally arising from the
5 breach of contract.

6 In making this determination, you must
7 determine the contract price, the amount that plaintiffs
8 paid to the defendant, any expenses that plaintiff may
9 have saved as a result of the breach, and the amounts
10 remitted to plaintiff.

11 Additionally, if plaintiffs still owed money
12 to defendant on the agreed-upon contract price, that
13 amount should not be included in any damages award.

14 So, folks, it's just a couple minutes after
15 11, and we are going to take a ten-minute break, and
16 then the rest of the charge is very brief.

17 So, during this break, please do not discuss
18 this case amongst yourselves or with anyone else. Don't
19 do any research on the case. Remember all of my
20 instructions to you. I'm not quite finished. I only
21 have a few minutes but we're going to take our 11:00
22 break. We stand in recess for ten minutes.

23 (Jurors excused)

24 THE COURT: As I believe counsel knows, but I
25 will reiterate, we have a juror with a medical condition

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1 that requires that we break for ten minutes at 11:00.
2 Otherwise, I would have finished the charge because I
3 was very close to being finished but we will reconvene
4 in ten minutes.

5 (Recess taken)

6 THE COURT: Let's get the jury please.

7 (Jurors present, 11:15 a.m.)

8 THE COURT: Members of the jury, I'm going to
9 take a moment to review the verdict sheet that you will
10 be given in the jury room, just to make sure that you
11 are clear on it.

12 It begins with what we call the caption of the
13 case. As I said, there are technically two plaintiffs,
14 Mr. Salamone and RUFSTR Racing, LLC., and to the right
15 of that is simply a number our court gives this case and
16 the initials of the judge; MAD is me.

17 We also have a magistrate judge, Judge
18 Stewart, and those are what those initials mean, so
19 there's nothing significant about that.

20 We will take a look at the beginning of the
21 jury verdict form. I note that each juror will be
22 provided with a verdict form. This is very important.
23 However, your verdict should be reported to the judge on
24 only one verdict form which we sign by the foreperson,
25 and then the remaining forms will be returned to the

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1 courtroom unsigned.

2 In order to help you in your deliberations,
3 I've prepared questions for you, and it's very important
4 that after each question, you follow the instructions
5 that are in boldface. That's critical.

6 So question 1-A I tell you that the parties
7 have stipulated that a valid contract existed between
8 the parties. So you don't -- in other words, you don't
9 have to decide if there was a valid contract. The
10 parties have admitted together that there was a valid
11 contract.

12 So then you go to question 1-B: Did
13 plaintiffs establish by a fair preponderance of the
14 credible evidence that plaintiffs substantially
15 performed their obligations under the contract? You
16 will answer that yes or no, and then carefully follow
17 the boldface.

18 If you answered yes to question 1-B, you go to
19 1-C. If you answer no to question 1-B, then your
20 deliberations are complete, and you return to the
21 jury -- into the courtroom and you will announce your
22 verdict. We will look at all of the questions just so
23 you see what's coming. How many questions you answer is
24 entirely up to you.

25 Okay? Again, just because I'm going over the

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1 entire verdict sheet, you decide how many questions are
2 answered by answering the questions in the order that I
3 have given them to you and then following the
4 instructions.

5 If you get to question 1-C, did plaintiffs
6 establish by a fair preponderance of the evidence that
7 defendant breached the contract by failing to tender the
8 Skater within a reasonable time? Again, you will answer
9 that yes or no. And I'm not going to read the whole
10 verdict form to you but you will follow the questions --
11 you will follow the instructions, I should say, under
12 that question.

13 If you get to question 1-D, has the defendant
14 proved by a preponderance of the evidence that
15 plaintiffs waived the right to insist on tender of the
16 Skater prior to June 27th, 2017? you will answer that
17 with a yes or no. Carefully follow the boldface
18 instructions.

19 1-E: Has defendant proved by a fair
20 preponderance of the evidence that plaintiffs breached
21 the contract by rejecting the Skater before defendant
22 tendered the Skater? And you get to that question, you
23 will answer it with a yes or no, to follow the boldface
24 instructions.

25 Question 1-F: Have plaintiffs proved by a

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1 fair preponderance of the evidence that they were
2 damaged as a result of defendant's breach? You will
3 answer that with a yes or a no and follow the boldface
4 instructions.

5 If you decide to award damages in this case,
6 1-G, what amount of compensatory damage, if any, do you
7 find that plaintiffs have proven by a fair preponderance
8 of the evidence would fairly compensate plaintiffs for
9 the damages resulting from defendant's breach? You will
10 fill that in with an amount that you believe is just and
11 reasonable based upon the evidence, and then your
12 deliberations would be complete.

13 To reiterate, you and you alone decide how
14 many of these questions you will answer by taking them
15 one at a time and following the boldface instructions
16 that follow them.

17 I have now outlined the rules of law
18 applicable to this case and the processes by which you
19 should weigh the evidence and determine the facts.

20 In just a few minutes, you're going to retire
21 to the jury room for your deliberations. Your first
22 order of business in the jury room will be to elect a
23 foreperson. The foreperson's responsibility is to
24 ensure that the deliberations proceed in an orderly
25 manner. The foreperson's vote, however, carries the

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1 same weight as the vote of any other juror.

2 As jurors, you are required to discuss the
3 issues and the evidence with each other. Although you
4 must deliberate with a view to reaching an agreement,
5 you must not violate your individual judgment or your
6 conscience in doing so.

7 The proper administration of justice requires
8 you to give full and conscientious consideration to the
9 issues and evidence before you in determining the facts
10 of the case, and then you apply the law as I have given
11 it to you to those facts.

12 To return a verdict, it is necessary that each
13 juror agree. Your verdict must be unanimous. During
14 your deliberations, do not hesitate to re-examine your
15 views and change your mind. Do not, however, surrender
16 your honest convictions because of the opinion of a
17 fellow juror or just for the purposes of returning a
18 verdict.

19 Remember, you're not the partisans. You are
20 the judges. The judges of the facts. Your duty is to
21 seek the truth from the evidence presented to you while
22 holding the parties to their burden of proof.

23 If in the course of your deliberations your
24 recollection of any part of the testimony should fail,
25 or if you should find yourselves in doubt concerning any

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1 instructions, it is your privilege to return to the
2 courtroom and to have the testimony read to you or my
3 instructions gone over with you and, again, or possibly
4 further explained. But remember this. One, you will
5 have a copy of my instructions in the jury room with
6 you; and two, it's been a short trial. If you do ask
7 for testimony to be read back to you, it does take us
8 awhile to find precisely what you want. So just have to
9 be patient with us if you send in a note and say we want
10 something reread. But obviously it's your collective
11 memories of the testimony that counts in this case.

12 You should make a conscientious effort to
13 resolve any questions as to the testimony, as I said,
14 through your collective recollections.

15 Should you desire to communicate with the
16 Court during your deliberations, please put your message
17 or your question in writing. The foreperson should sign
18 the note and pass it to the marshal, who will bring it
19 to my attention. I will then respond by having all of
20 you brought back into the courtroom. So what I do is I
21 share the note or the question that you have with the
22 attorneys. I give them a copy of it. I bring you back
23 into the courtroom. I read your note or your question,
24 and then I do my best to answer what it is in a may be
25 on your mind.

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1 There is no time limits on your deliberations,
2 members of the jury. Once you have reached a unanimous
3 verdict, your foreperson should fill in one verdict
4 form, date it and sign it, and inform the marshal that
5 you have reached a verdict.

6 Britney, would you swear in our court officer
7 please.

8 COURT CLERK: Yes, Judge. Please raise your
9 right hand and state your full name for the record
10 please.

11 COURT OFFICER: Joseph Graziane.

12 (Court officer sworn.)

13 THE COURT: Now as I said yesterday, your
14 lunch is going to be delivered. It's entirely up to you
15 if you want to deliberate while you eat or you want to
16 pause and then deliberate. I don't know if we have any
17 individuals on the jury who smoke; sometimes we do. But
18 the bottom line is, if anybody is in the bathroom or if
19 anyone is outside smoking, the deliberations have to
20 stop until all eight of you are together. So, when you
21 deliberate, it's always eight of you together.

22 In just a few minutes, we are going to get all
23 of the evidence for you. As I said on day one, we put
24 it in a binder. There's no easy way to do this during
25 COVID precautions because even if I sent a computer in,

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1 it could end up in people being too close as you gather
2 around the computer. So we're sending in the evidence
3 in a binder with sterile gloves. Look at the evidence
4 all you want to, one at a time, unless the rest of you
5 are at a distance, and if you look at the evidence in
6 the binder more than once, take off your old gloves and
7 put a new pair on. Okay? And continue to do all of the
8 things that you have done to keep yourself safe and
9 healthy since Monday because we certainly, has the
10 lawyers have said, appreciate your willingness to be
11 here.

12 So in just a moment we are going to send the
13 evidence in. I'm just going to have the lawyers look at
14 the evidence and tell me that that's exactly what they
15 want sent in. We have it ready. And then you'll go in
16 and deliberate. So, at this time, I'm instructing you
17 to please retire to the jury room and begin your
18 deliberations.

19 (Jurors excused, 11:27 a.m.)

20 MR. HALLAK: Your Honor, on the verdict form
21 that we just got, we notice one small unintentional
22 error here, and it's under 1-C and the instructions
23 after the answer, it says if you answered yes to 1-C,
24 please proceed to 1-D. If you answered no to 1-B, your
25 deliberations are complete. I think that B was supposed

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1 to be a C. So I think that was --

2 THE COURT: That is. And this verdict sheet
3 hasn't gone in yet.

4 MR. HALLAK: That's why I wanted to bring it
5 up now before it went in to the jury and somebody might
6 have been confused.

7 THE COURT: We will make that correction and
8 get it in. Have both sides had an opportunity to look
9 at the evidence that we have proposed to send in?

10 MR. HALLAK: Not yet.

11 THE COURT: Okay.

12 MS. HOFFMAN: I'm sorry.

13 THE COURT: Feel free to take a look because
14 I'm going to ask you if that is satisfactory to you in
15 just a minute. Britney is pretty good at putting that
16 evidence binder together but you take a look and make
17 sure you're comfortable.

18 MR. HALLAK: We're okay. Go ahead.

19 MS. HOFFMAN: Looks great.

20 COURT CLERK: And they will each have a copy
21 of the jury instructions and the verdict form once it's
22 corrected.

23 THE COURT: Is the evidence as we propose to
24 send it in to the jury satisfactory to the plaintiff?

25 MR. LITTLE: It is, your Honor. Thank you.

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1 THE COURT: Is the evidence as we propose to
2 send it in to the jury satisfactory to defense counsel?

3 MR. HALLAK: It is for the defense as well,
4 your Honor. Thank you.

5 THE COURT: Okay. Let me say this now before
6 a verdict comes in. I appreciate how prepared the
7 attorneys have been for this trial. I appreciate, for
8 the most part, your written submissions; particularly
9 your memos of law. Obviously I'm always trying to move
10 a trial along because, as you've seen at different times
11 in this case, it's not easy for jurors always to stay
12 with us. They tire, and we can physically see it and so
13 when I was telling people to move along, it was so that
14 we could hopefully have the jurors' attention.

15 Contract cases, they -- for jurors, they are
16 not the most scintillating; I will tell you that. And
17 so, when I was admonishing both sides to move along,
18 there was a reason for that, and you followed my
19 instructions, and we did not have eventually a whole lot
20 of repetition in the case, which I think helped with
21 juror attention.

22 But it has been an enjoyable experience to
23 work with counsel, and you all knew the facts of this
24 case. It was obvious to me from the moment we started
25 until the moment we finished.

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1 The jury is deliberating. I settled many a
2 case while a jury is deliberating. Just throw that out
3 for you. And obviously this case has not been settled
4 and we have put it in the hands of the jury. I would
5 ask that you all -- and your clients realize that we
6 might have to assemble in the courtroom sooner rather
7 than later, so Britney should have the cell phone
8 numbers of the attorneys.

9 If this jury has a question in 15 minutes, we
10 have to get you back here. And the important thing
11 about that is to answer your phone if we call it. I
12 can't tell you how many times we say to lawyers give us
13 your phone number, but then when we call, they don't
14 answer and lawyers have to have the phone numbers of the
15 clients if they want the clients in here to hear the
16 jury question or the jury verdict.

17 So I'm not saying that you have to sit in the
18 courthouse right now, but you need to be not too far
19 from the courthouse so that we can get you back here if
20 we get a note. Okay? Thank you.

21 (Pause in proceeding)

22 * * * * *

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C E R T I F I C A T I O N

I, Lisa L. Tennyson, RMR, CSR, CRR, Federal Official Realtime Court Reporter, in and for the United States District Court for the Northern District of New York, do hereby certify that pursuant to Section 753, Title 28, United States Code, that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.



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